Supreme Court, U.S.
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NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

JAMES E. BUTLER, JR.,

Petitioner,

v.

GENERAL MOTORS CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May a federal court of appeals levy a substantial contempt sanction against an attorney and characterize that sanction as civil in nature, when the sanction is sought to vindicate the "integrity" of the court and a private-party litigant; has the attributes of a criminal sanction; and is entered without customary procedural protections, including the right to dispassionate, appellate review?

2. Does a federal court lose its power to impose a civil contempt sanction after the disposition of the underlying case from which the contempt claim arose?

3. Does the "inherent power" of a federal court to impose sanctions include the power to impose a substantial contempt fine against an attorney for statements made in proper judicial proceedings before other courts, when proceedings before the sanctioning court have ended and there is no indication that the courts in which the statements were made took umbrage?

LIST OF PARTIES

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed appear in the caption.

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IN THE

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No. 96-

JAMES E. BUTLER, JR.,

Petitioner,

v.

GENERAL MOTORS CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI

James E. Butler, Jr. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinions of the court of appeals are reported at 61 F.3d 256 (App., 1a-9a) and 110 F.3d 1003 (App., 10a-99a). The court of appeals acted as a court of first instance.

JURISDICTION

The court of appeals held petitioner in contempt on

August 8, 1995 (App., 1a-9a). The court of appeals denied a petition for rehearing and rejected a suggestion for rehearing *en banc* on September 6, 1995 (*id.*, 135a-36a). The court of appeals imposed its contempt sanction on February 28, 1997 (*id.*, 10a-99a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).[1/]

CONSTITUTIONAL PROVISIONS INVOLVED

Article I of the United States Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States[.]" Article II provides that "[t]he executive Power shall be vested in a President." Article III provides that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." The Fifth Amendment to the Constitution provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law[.]"

STATEMENT

This case questions the "inherent power" of a federal court of appeals to impose a substantial contempt sanction, without observing the limitations and procedural protections that the United States Constitution requires for the exercise of such extraordinary and potentially abusive judicial authority.

From 1973 through 1987, respondent General Motors Corporation ("GM") manufactured C/K model pickup trucks with fuel tanks mounted outside the vehicle chassis. Petitioner

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[1/] Both orders of the court of appeals are properly reviewable at this time. *See Mercer v. Theriot*, 377 U.S. 152, 153-54 (1964); *see also Burlington N. Inc. v. United States*, 459 U.S. 131, 138 n.5 (1982).

James E. Butler, Jr. ("Butler") is an attorney who represents individuals and the heirs of individuals who have been injured or killed by explosive fires traced to this fuel-tank design. Three such cases are relevant here: (1) *Cameron v. General Motors Corp.*, Nos. 6:93-1278-3, 1279-3, 1280-3 (D.S.C.); (2) *Moseley v. General Motors Corp.*, No. 90-V-2676 (Fulton Cty. Ct., Ga.); and (3) *Cockrum v. General Motors Corp.*, No. 93-1180 (D. Kan.).

A. The *Cameron* Orders

In December 1993, in response to motions filed by petitioner, the *Cameron* court (Anderson, J.) ordered certain GM counsel to submit to depositions and to produce materials that GM had sought to withhold from discovery on grounds of privilege. The basis for these orders was a series of findings by the court that the attorneys in question may have engaged in improper concealment and the destruction of documents. Respondent GM promptly moved to vacate these orders and to seek the court's recusal for alleged bias.

On February 28, 1994, the court granted GM's motion. The court, however, rejected GM's allegations of bias and restated its earlier findings. Specifically, in Section III of his order, Judge Anderson observed:

> A review of the thousands of documents in this case including *in camera* reviews of documents for which an attorney-client privilege was asserted reveals a substantial likelihood that perhaps perjury and the systematic destruction of documents involving gross misconduct by General Motors' regional counsel occurred. Evidence of the commission of such activity combined with the knowledge of these General Motors' regional counsel would defeat the attorney-client and work-product privileges asserted by General Motors. There is clearly

> evidence having a sufficient foundation in fact to establish a *prima facie* case that the documents for which an attorney-client privilege is asserted are subject to the crime-fraud exception.

Cameron, Nos. 6:93-1278-3 *et seq.*, Order, at 48 (D.S.C. Feb. 28, 1994).

Notwithstanding these findings and his rejection of GM's allegations of bias, Judge Anderson went on to note that "[p]ublic confidence in the impartiality and fairness of the judiciary must forever remain inviolate." *Id.* at 58-59. Accordingly, because he found that "a reasonable person could possibly view [his] mere appearance on the same legal education program with [Butler and one of his co-counsel] as compromising [his] fairness and impartiality," the Judge recused himself "from further participation in these cases" and vacated the five discovery orders that GM had challenged. *Id.* at 59. The Judge stressed that his recusal was "for this reason only" and "out of a super abundance of caution." *Id.*

Respondent GM petitioned the Fourth Circuit for mandamus, contending that it was improper for the district court to restate findings of possible misconduct by GM's attorneys in the same order in which the court recused itself. On March 23, 1994, the Fourth Circuit agreed and granted mandamus. App., 100a-02a. The court stated in part:

> [I]t was improper [for Judge Anderson] to make new findings of fact and conclusions of law on the issues addressed by [the five discovery orders that he vacated pursuant to his recusal]. As a result, Section III of the recusal order, as well as any other statements in the order relating to the possible destruction of documents, perjury by [GM] or [GM's] counsel, or applicability of the crime-fraud exception of the attorney-client and work-product

> privileges to the facts of this case, are hereby *stricken from the order* and *should not hereafter be cited as authority*.

Id., 101a-02a (emphasis added and footnote omitted).

On remand, the *Cameron* case was reassigned to the Honorable Charles H. Haden, and Butler moved to reinstate the vacated orders. On August 22, 1994, Judge Haden granted Butler's motion and once again ordered GM to make certain counsel available for depositions, to make certain disclosures, and to surrender documents previously identified by Judge Anderson for *in camera* review. *See Cameron*, Nos. 6:93-1278-3 *et seq.*, Order (D.S.C. Aug. 22, 1994).

B. The *Moseley* Letter

Many months before the foregoing events in *Cameron*, Butler and his firm obtained a multi-million dollar jury verdict against GM on behalf of the heirs of Shannon Moseley, a teenager who burned to death when the fuel tank on his GM truck exploded during an accident in 1989. On June 13, 1994, the Georgia Court of Appeals reversed the *Moseley* verdict and remanded that case for further proceedings. *See General Motors Corp. v. Moseley*, 447 S.E.2d 302 (Ga. Ct. App. 1994). On remand, the parties engaged in a dispute before the trial court about what further discovery, if any, ought to be allowed before a retrial of that suit.

In connection with this dispute, on August 26, 1994 (four days after the aforementioned order by Judge Haden in *Cameron*), respondent GM delivered a letter to the Georgia trial court (Thompson, J.) in which it argued that "the question of General Motors' privileges" and the alleged misconduct of some of its attorneys was "closed."

In response, on August 30, 1994, Butler sent a lengthy letter of his own to the court. *Id.*, 141a-52a ("the *Moseley* letter"). Butler disputed GM's assertions and described pertinent events that had occurred in related cases since the *Moseley* remand. *See id.* In so doing, he referred to and specifically quoted part of Judge Anderson's order in *Cameron* that the Fourth Circuit had "stricken" and had ordered "should not hereafter be cited as authority." *See id.*, 143a-44a.[2/]

C. The Order To Show Cause

Respondent GM reacted to the *Moseley* letter by initiating the present proceedings. On September 14, 1994, GM filed a motion, directly with the Fourth Circuit, for an order requiring Butler "to show cause why he should not be held in *civil and/or criminal contempt*" for quoting Judge Anderson's stricken language in his letter to the Georgia state court. *In re General Motors Corp.*, No. 94-1011, Petitioner General Motors' Motion for Order to Show Cause, at 5, 8 (Sept. 14, 1994) (emphasis added). Respondent cited no authority for its invocation of the Fourth Circuit's jurisdiction.[3/] Respondent also offered no explanation for why it had not sought relief through more conventional measures, such as direct discussions with Butler himself or a motion to strike before

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[2/] On September 2, 1994, GM delivered a letter to the *Moseley* court in response to Butler's letter of August 30. This letter enclosed a copy of the Fourth Circuit's March 23, 1994 order and sought to correct "immediately" Butler's quotation of the stricken language.

[3/] There was no apparent basis for appellate jurisdiction over this motion. The Fourth Circuit's March 23, 1994 order had been a mandamus ruling in the *Cameron* case, pursuant to which the court had "remanded [that case] to the district court for further proceedings consistent [t]herewith." App., 102a. The *Cameron* case remained in the district court when GM filed its show-cause motion.

the Georgia state court.

On October 3, 1994, Butler filed an extensive response. Three days later, the Fourth Circuit granted GM's motion and ordered Butler "to appear personally on October 20, 1994 . . . to show cause why he should not be held in contempt for violating this Court's order of March 23, 1994." App., 103a. The order did not indicate whether the court contemplated a civil or criminal proceeding.

D. The *Cockrum* Brief

Three days before the scheduled hearing, GM moved for leave to submit "supplemental evidence into the record." *In re General Motors Corp.*, No. 94-1011, Petitioner General Motors' Motion for Leave to Submit Additional Documentary Evidence, at 1 (Oct. 17, 1994) ("GM Supp. Mot."). Although the Fourth Circuit's order to show cause had been predicated solely on the *Moseley* letter, GM's supplemental evidence, which it filed with its motion, related to a variety of other statements that GM claimed also violated the March 23, 1994 order. One such item of "additional evidence" was a copy of a brief ("the *Cockrum* brief") that one of Butler's partners had filed with the federal district court in Kansas in the *Cockrum* case on April 1, 1994—5½ months before the filing of GM's show-cause motion.

The *Cockrum* brief responded to a motion that GM had filed on March 21, 1994, to seek an order to prevent Butler from taking the attorney depositions that he had recently been granted permission to take by Judge Anderson in *Cameron*. Two days after GM filed its motion, the Fourth Circuit issued its March 23, 1994 order striking Judge Anderson's *Cameron* findings, and on March 25, 1994, GM filed with the *Cockrum* court a "supplemental memorandum" in support of its motion, *attaching and emphasizing the Fourth Circuit's order*.

The *Cockrum* brief was filed in response to GM's motion and supplemental memorandum, and it took issue with GM's interpretation of the Fourth Circuit's order. Specifically, the *Cockrum* brief noted that nothing in the order addressed the underlying factual accuracy of Judge Anderson's findings: the order did not overrule those findings as clearly erroneous but rather ordered them stricken because "it was improper [for Judge Anderson] to make new findings of fact and conclusions of law" in the same order in which he recused. App., 101a.

Thus, although the *Cockrum* brief had been filed in response to GM's invocation of Judge Anderson's findings and its reliance on the Fourth Circuit's order striking them, GM suggested to the Fourth Circuit that the brief's discussion of those findings was "supplemental evidence" that Butler had engaged in contempt. At the same time that GM made this suggestion, however, it conceded that the *Cockrum* brief was *"not a literal violation of [the Fourth Circuit's March 23, 1994] Order."* GM Supp. Mot., at 3 (emphasis added).

On the day after GM filed its supplemental submission, Butler objected to it, and the parties then appeared, as ordered, for the show-cause hearing two days later.

E. The Show Cause Hearing

At the commencement of the show-cause hearing, Butler's counsel immediately sought clarification of whether the proceeding was civil or criminal, and he objected to any suggestion that it might be criminal. App., 106a. In response, GM's counsel stated that he "view[ed] the Court's order [to show cause] to be *open-ended* in that respect" and that it was "*in the discretion of th[e] Court* as to how this proceeding should be conducted and styled;" he thus urged the court to allow him to proceed with his argument and to resolve this issue in its deliberations. *Id.* (emphasis added).

The court accepted this suggestion without further explanation, allowing GM to proceed and informing Butler that it considered the issue "a procedural matter that we can dispose of without much difficulty" at a later stage. *Id.*

Respondent GM then presented an oral argument in which it asked the court to hold Butler in contempt, without defining whether that holding should be civil or criminal in nature. Respondent concluded its argument by urging the panel *"to vindicate what we think is at stake . . . the dignity of this Court."* *Id.*, 112a (emphasis added).

In response, Butler renewed his objection to the "open-ended" nature of the proceeding and argued that his conduct could not be viewed as contumacious by either a civil or a criminal standard. *Id.* 112a-13a.

In its questioning of Butler, the court made clear that, like GM, it too considered the purpose of the hearing to be the vindication of its integrity.[4/] On rebuttal, GM re-emphasized that it shared this understanding:

> This case is about honor and integrity and what officers of the Court should do, and it's about an accounting. It's about responsibility for the actions taken by someone who would hold the mantle, a sacred trust, called 'Officer of the Court.' It means an attitude of respectfulness for courts. . . . That is what this case is all about. I do not want to belabor *the pettifogging distinctions between criminal and civil contempt*. We're here about integrity.

[4/] *See, e.g.*, App., 114a (Court: "What about the integrity of this Court?"); *id.*, 114a-15a (Court: "Are you going to sit here and tell me . . . that [the March 23, 1994 order] wasn't a prohibition? Are you going to further insult this Court by telling us that?").

> We're here because this Court's integrity has been violated. It's honor has been violated and so has General Motors . . . . The integrity of General Motors' counsel has been attacked here at this podium . . . .

Id., 130a-31a (remarks of Mr. Starr) (emphasis added).

Although GM did not present any evidentiary showing of harm, it concluded its argument by insisting that it had been injured by Butler's conduct because the Georgia state court, like the *Cameron* court before it, had ordered certain GM attorneys to submit to depositions, and "General Motors and its outside counsel, the former Attorney General of the United States, Judge [Griffin] Bell," had been forced "to tell Judge Thompson" that they would not allow their lawyers to sit for these depositions. *Id.*, 132a. Thus, GM cited as its injury (1) the alleged damage to its integrity and (2) the fact that the Georgia state court had entered an unfavorable discovery order in the *Moseley* case—an order that GM suggested it was prejudicially but justifiably required to disobey.

For relief, GM requested an order requiring Butler to provide two letters of apology, a certification identifying any other people or entities to which he had sent Judge Anderson's order, a broadening of the March 23, 1994 order, and an award of its "expenses in these proceedings." *Id.*, 132a-33a.

F. The First Contempt Order

Two months after the show-cause hearing, on December 13, 1994, GM moved to supplement the record again, protesting that Butler had not sufficiently corrected the record before the *Moseley* court and had made further improper statements in a letter to a federal court presiding over yet another case in Oklahoma. Another six months passed, and on June 22, 1995, GM moved for "additional relief." *In re*

General Motors Corp., No. 94-1011, General Motors' Motion for Additional Relief (June 22, 1995) ("GM Add'l. Mot.").

Significantly, in its June 1995 motion, GM conceded in a footnote that the *Cameron* case, "from which [the Fourth Circuit] originally took jurisdiction over this matter[,] . . . settled in December, 1994." *Id.*, at 2 n.1. In response, on June 30, 1995, Butler moved to dismiss the entire proceeding, citing procedural irregularities, First Amendment concerns, and the court's lack of jurisdiction in light of the *Cameron* settlement. Respondent opposed this motion and reasserted its contention that the court could impose criminal sanctions.

On August 8, 1995, the Fourth Circuit issued its order holding Butler in contempt. App., 1a-9a. In a pair of footnotes, the court denied Butler's motion to dismiss and rejected his argument that the court had lost jurisdiction over the matter with the settlement in *Cameron*. *See id.*, 8a, 9a, nn.3-4. The court held that "GM has satisfied its burden of demonstrating by clear and convincing evidence that Butler violated the specific and unequivocal commands of our order of March 23, 1994." *Id.*, 6a. Finding that its earlier order "was clear and unequivocal" in striking Judge Anderson's language and in ordering that his statements "were not to 'be cited as authority,'" the court held Butler in contempt for both the *Moseley* letter and the *Cockrum* brief. *Id.*, 6a. The court characterized its order as civil in nature. *Id.*, 5a-7a.

Although the record contained no evidence of injury or damages, the court further found, as a matter of fact, that GM had suffered a compensable loss. *Id.*, 7a. It also awarded relief for that loss:

> As a result of Butler's contumacious behavior, GM is entitled to be compensated for its expenses germinating from Butler's misconduct in the Georgia state court and

> the United States District Court for the District of Kansas. Furthermore, GM is entitled to reasonable costs and attorney's fees for the contempt proceeding before this court.

Id., 8a.

G. The Second Contempt Order

On August 31, 1995, after GM submitted a three-page "summary of expenses" requesting over $212,000, Butler moved for an evidentiary hearing to determine the proper amount of any compensable loss. On September 11, 1995, the court referred the matter "for review and determination of the proper amount to be assessed . . . to United States District Judge Robert G. Doumar of the Eastern District of Virginia, with all the power and prerogative incident to such assignment." *In re General Motors Corp.*, No. 94-1011, Order (Sept. 11, 1995).

Thereafter, Judge Doumar ordered briefing by both sides, and on January 30, 1996, he entertained oral argument on Butler's request for an evidentiary hearing. Considerable further briefing followed, as GM submitted attorney billing records and other materials for *in camera* review and as Butler objected and sought access to and a hearing on all of the materials on which GM relied for its damages claim.

On March 5, 1996, Judge Doumar ordered GM to produce to Butler a portion of its *in camera* submission: a modified summary of the attorney billing records on which GM sought to rely. This document revealed that GM's damages claim consisted solely of attorney fees incurred in its underlying defense of the *Moseley* and *Cockrum* cases and its prosecution of the contempt proceeding and the fee demand itself. This document also revealed that GM's claim had

increased, since the submission of its original summary of expenses, to over $304,000.

On July 26, 1996, Judge Doumar entered his Final Report and Recommendation, denying Butler's motion for an evidentiary hearing and recommending that GM "be awarded a total of $190,541.31 . . . , including attorneys' fees through January 30, 1996." App., 13a. Judge Doumar concluded that Butler's contempt was "solely responsible for damages in the amount of $1613.50" in *Moseley* and for zero damages in *Cockrum*. *Id.*, 70a. He further concluded that Butler's contempt was "contributorily responsible" for "damages in the amount of $17,284.00 in *Moseley*, and . . . $5997.00 in *Cockrum*," although he declined to specify the other contributing causes for these amounts. *Id.* Finally, he concluded that GM was entitled to recover "$165,646.81 in attorneys' fees for this contempt proceeding." *Id.*, 99a.

Judge Doumar thus found that "GM's 'expenses germinating from Butler's misconduct in the Georgia state court and the United States District Court for the District of Kansas' come to a total of $24,894.50"—an amount representing 24% of the total amount of fees that GM had requested for the two underlying proceedings and 13% of the total recommended award. *Id.*, 70a (quoting contempt order).

After providing an opportunity for the parties to brief exceptions to Judge Doumar's recommendation, the Fourth Circuit entered its final order on February 28, 1997, accepting Judge Doumar's Final Report and Recommendation in full and without substantive comment. *Id.*, 10a-99a (attaching Final Report and Recommendation as an appendix).

REASONS FOR GRANTING THE PETITION

I. Petitioner Was Denied the Basic Procedural Protections Required for Contempt Proceedings.

A. Review by this Court Represents Petitioner's Only Opportunity for Dispassionate Review.

The Court has repeatedly warned that the contempt power is uniquely "'liable to abuse'" because it appeals to "'the most vulnerable and human qualities of a judge's temperament'" and leaves the offended court "solely responsible for identifying, prosecuting, adjudicating, and sanctioning" the challenged conduct. *International Union, UMWA v. Bagwell*, 512 U.S. 821, 831 (1994) (citations omitted). In light of this fact and the relative breadth and indeterminacy of the contempt power, the observance of procedural safeguards in contempt cases is of utmost importance. *See id.* at 832-34. Perhaps the most critical procedural safeguard in these circumstances is the right to dispassionate, appellate review. *See United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 76 (1988) ("The right of a nonparty [to an underlying suit] to appeal an adjudication of contempt cannot be questioned.")

Here, because the proceedings were initiated in and occurred entirely before the offended court of appeals, petitioner has been denied dispassionate factfinding and any appellate review. Unless granted review by this Court, he will have been denied the opportunity for any dispassionate, higher-court review of any kind. To require an attorney to pay a fine of over $190,000 to the corporate adversary of a client under these circumstances is manifestly unjust.

Indeed, this Court has previously recognized a need to intervene when an appellate court has acted as a court of first

instance and has imposed a severe contempt sanction against an attorney. *See In re Snyder*, 472 U.S. 634 (1985). In *Snyder*, the Court unanimously reversed a decision by the Eighth Circuit to suspend an attorney from the practice of law for six months for writing an offending letter to the court. The Court held that the Eighth Circuit's finding that the letter was "disrespectful" of its authority could not support its holding that the letter was "contumacious conduct" warranting the harsh sanction of suspension. *Id.* at 646.

Here, for reasons discussed further below, the need for the Court to intervene is even more compelling than it was in *Snyder*. First, there are numerous indications that the Fourth Circuit yielded to passion and put aside its better judgment in considering this matter. To cite just two examples:

1. the court held Butler in contempt for an act (*i.e.*, his partner's submission of the *Cockrum* brief) that was not a subject of GM's show-cause motion or the court's show-cause order and that GM concedes was "not a literal violation of [the Fourth Circuit's March 23, 1994] Order" (GM Supp. Mot., at 3)); and

2. the court found, as a matter of fact, that GM had suffered "a compensable loss" in the *Moseley* and *Cockrum* courts and awarded relief for that loss, even though GM had not submitted evidence of any such loss and had presented no such argument or request for relief, either in its show-cause motion or at the show-cause hearing (App, 7a-8a, 132a-33a).

Second, unlike *Snyder*, the present case raises compelling constitutional questions regarding the procedural requirements for a contempt proceeding and the proper scope of a court's inherent contempt power—questions on which the lower courts have divided. *See infra*, Parts I.B-C, II.A-B.

Third, whereas the offending letter at issue in *Snyder* was a letter to an Eighth Circuit court regarding an Eighth Circuit matter, the offending letter and brief at issue here were never submitted to the sanctioning court and concerned proceedings in other jurisdictions. This case thus poses fundamental questions about federalism and judicial comity. *See infra*, Part II.B.

B. The Lower Courts Have Divided Over What Due Process Requires in a Contempt Proceeding, and the Fourth Circuit's Position Is Erroneous.

Even if properly viewed as a civil judgment (*but see* Part I.C, *infra*), the Fourth Circuit's decision violates the dictates of due process.

1. First, in order to provide a basis for any finding of contempt, an underlying order must provide an unmistakable command. Like any injunction, it must "state in 'specific . . . terms' the acts that it require[s] or prohibit[s]." *International Longshoremen's Ass'n v. Philadelphia Marine Trade Ass'n*, 389 U.S. 64, 76 (1967) (citation omitted). The lower courts have recognized this requirement of clarity and specificity, at least in principle. *See, e.g.*, App., 5a-6a; *Harris v. City of Philadelphia*, 47 F.3d 1342, 1350 (3d Cir. 1995) ("The order which is said to have been violated must be specific and definite[;]" ambiguities must be construed "to favor the party charged with contempt[;]" and a contempt citation should not issue "if there is ground to doubt the wrongfulness of the defendant's conduct.") (citation omitted); *Project B.A.S.I.C. v. Kemp*, 947 F.2d 11, 17 (1st Cir. 1991) ("[f]or a party to be held in contempt, it must have violated a clear and unambiguous order that left no reasonable doubt as to what behavior was expected"); *H.K. Porter Co. v. National Friction Prods. Corp.*, 568 F.2d 24, 27 (7th Cir. 1977) (order "must set forth in specific detail an unequivocal command").

There is apparent confusion among the courts, however, with respect to whether an order that states that a certain act *"should not"* be performed is sufficiently unambiguous and injunctive to serve as a basis for contempt. Here, the Fourth Circuit answered this question in the affirmative. *See* App., 6a. Other courts have reached the opposite conclusion. *See, e.g., United States v. Robinson*, 922 F.2d 1531, 1534 (11th Cir. 1991) (lawyer could not be held in contempt for violating court rule that stated what attorneys "should" do because the rule was "precatory rather than mandatory"); *In re Baum*, 606 F.2d 592, 593 (5th Cir. 1979) (lawyer could not be held in contempt for violating an order that vacated a deposition notice because the order "did not explicitly direct that the deposition not take place").[5/]

The logic of the latter decisions is undeniably sound, and the position of the Fourth Circuit in this case is untenable. There is an obvious and common-sense difference between a precatory decree and a mandatory decree and between the verbs "should" and "shall." Moreover, due process requires fair notice; hence, any conceivable ambiguity must be construed against a finding of contempt. *See Harris*, 47 F.3d at 1350. To allow a precatory order to serve as a basis for contempt thus creates a serious constitutional problem.[6/]

[5/] In *Robinson*, the Eleventh Circuit vacated a contempt citation against an attorney (coincidentally named Butler) who breached a local rule instructing that, "'[i]n making objections, counsel should state only the legal grounds for the objection and should withhold all further comment or argument unless elaboration is requested by the Court.'" 922 F.2d at 1534 (quoting local rule). The court held that the precatory language of the rule and the lack of any direct warning from the trial judge had denied the lawyer sufficient notice of the risk of contempt. *Id.* at 1534-35.

[6/] *Compare* App., 102a (March 23, 1994 order) (stricken statements "should not hereafter be cited as authority") *with id.*, 6a (contempt order) (stricken statements "were not to 'be cited as authority'").

The ramifications of the Fourth Circuit's reasoning are also ominous. Because every appellate reversal of a lower court decision may be viewed as a command that the lower court's ruling "should not hereafter be cited as authority," every such decision (like the Fourth Circuit's underlying ruling here) could serve as the basis for a substantial contempt fine, so long as the appellate court expressly stated the intended precedential effect of its reversal in the body of its order. Similarly, under this logic, local court rules governing the citation of unpublished decisions are a potential source for contempt rulings. Indeed, some local rules on this subject use mandatory language (*e.g.*, "shall not") and thus, are more obviously injunctive than the Fourth Circuit's underlying order here. *See, e.g.*, 2d Cir. R. § 0.23; 8th Cir. R. 28A(k); 9th Cir. R. 36-3.[7/]

2. The Fourth Circuit also erred (and spawned a further conflict among the circuits) in declining to grant petitioner an evidentiary hearing. In *Cooke v. United States*, 267 U.S. 517 (1925), the Court long ago held that "[d]ue process of law . . . in the prosecution of [a non-summary, civil] contempt

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7/ Despite this fact, petitioner is aware of no case in which an attorney has been held in contempt for citing an unpublished decision. Typically, courts simply ignore such citations. *See, e.g., In re Burns*, 974 F.2d 1064, 1067 (9th Cir. 1992); *United States v. Lincoln*, 956 F.2d 1465, 1473 n.7 (8th Cir.), *cert. denied*, 506 U.S. 891 (1992); *United States v. Gigante*, 538 F.2d 502, 506 n.8 (2d Cir. 1976). By contrast, where court rules state that a document *"should not"* be cited as authority, courts occasionally find citations to such documents helpful. *See, e.g., Edge v. Schweiker*, 814 F.2d 125, 127 n.1 (3d Cir. 1987) (it was not improper but "necessary" to refer to an unpublished opinion—which "should not be cited as authority"—for purposes of "record[ing] the law of this case"); *McKnight v. Commissioner*, 58 T.C.M. (CCH) 1390, 1393 (U.S.T.C. Feb. 13, 1990) (citation to a legal document that had "no precedential value and should not be cited as authority" was not improper, and its reasoning could be relied upon "as persuasive").

requires that the accused . . . have a reasonable opportunity to meet [the charges] by way of defense or explanation. We think this includes . . . the right to call witnesses to give testimony, relevant *either to the issue of complete exculpation or in extenuation of the offense and in mitigation of the penalty to be imposed.*" *Id.* at 537 (emphasis added).

The Eighth, Eleventh, and D.C. Circuits have recognized this right to an evidentiary hearing in broad terms. *See Fisher v. Marubeni Cotton Corp.*, 526 F.2d 1338, 1343 (8th Cir. 1975) (reversing, as a violation of due process, a civil contempt sanction that required payment of costs and attorney fees because "[e]vidence as to costs and expenses to be taxed should have been presented in open court" and because appellant had a right to "explain his position, present his defense and question the items of claimed expense"); *see also Food Lion, Inc. v. UFCW*, 103 F.3d 1007, 1019 (D.C. Cir. 1997) ("In this circuit, '[e]very civil contemnor who asserts a genuine issue of material fact is entitled to a full, impartial hearing.'") (citations omitted); *Mercer v. Mitchell*, 908 F.2d 763, 766-67 (11th Cir. 1990) (vacating $30,600 civil contempt sanction and holding that "[w]hen the purportedly contumacious conduct occurs outside the presence of the court, due process requires, with very few exceptions, that the defendant be informed, through a show-cause order, of his purportedly contumacious conduct, and be given a hearing at which he can be represented by counsel, call witnesses, and testify in order to show cause why he should not be held in contempt") (footnotes omitted).

Like the Fourth Circuit here, however, the First and Second Circuits have held that a request for an evidentiary hearing lies in the court's discretion and may be denied. *See, e.g., In re Grand Jury Proceedings*, 795 F.2d 226, 234-35 (1st Cir. 1986), *cert. denied*, 479 U.S. 1064 (1987); *In re Kitchen*, 706 F.2d 1266, 1273 (2d Cir. 1983); *In re Rosahn*,

671 F.2d 690, 695 (2d Cir. 1982). In "a close case" in which it affirmed the denial of an evidentiary hearing, the First Circuit observed:

> There is general agreement that due process requires that a potential contemnor be given notice and a hearing regardless of whether the contempt is civil or criminal in nature . . . . Whether a contemnor has the right to call witnesses at an evidentiary hearing before being adjudged in civil contempt and subjected to a fine, however, is a question which has rarely been addressed by the courts.
>
> . . . .
>
> [I]n the civil contempt context, less than full adversary hearings have been held to comport with due process under certain circumstances.

In re Grand Jury Proceedings, 795 F.2d at 234.

As these cases suggest, there is a pressing need for Supreme Court guidance on this important question. Here, the Fourth Circuit held Butler in contempt and found as an appellate court—without an evidentiary hearing or any record on the subject—that GM had suffered "a compensable loss." It then referred the matter, *post hoc*, to a district judge, sitting in the nature of an appellate master. *See* Fed. R. App. P. 48. That judge again denied an evidentiary hearing and recommended a $190,000 sanction, which the court of appeals accepted with little comment, on the basis of an *in camera* fee request.[8/]

[8/] Judge Doumar acknowledged that the Fourth Circuit's contempt order effectively tied his hands with respect to the key evidentiary issues of (continued...)

Particularly in light of this Court's observations about the potential for abuse in contempt cases, the right of an accused contemnor to have the customary procedural safeguard of an evidentiary hearing should not be in serious doubt.[9/] The Fourth Circuit's denial of an evidentiary hearing in this case was a denial of due process. *Cf. United States v. Zolin*, 491 U.S. 554, 570-71 (1989) (noting "the possible due process implications of routine use of *in camera* proceedings" and the need to avoid them except in exceptional circumstances); *Briscoe v. Kusper*, 435 F.2d 1046, 1057 (7th Cir. 1970) ("Reliance upon evidence considered *in camera* as the basis for decision is fundamentally inimical to due process.").

C. The Fourth Circuit's Reasoning Eviscerates Any Meaningful Distinction Between Civil and Criminal Contempt Sanctions.

The Court has long recognized that there are important distinctions between civil and criminal contempt. *See Bagwell*, 512 U.S. at 826-34. The Court has also long recognized that "conclusions about the civil or criminal nature of a contempt sanction are properly drawn, not from 'the

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[8/](...continued)
causation and injury. *See* App., 40a, *see also id.*, 33a. He thus treated GM's damages claim like the fee request of a prevailing party, whose legal entitlement to such fees had already been determined.

[9/] *See, e.g., Allied Materials Corp. v. Superior Prods. Co.*, 620 F.2d 224, 227 (10th Cir. 1980) (vacating $12,000 contempt sanction that was based on vague, self-serving testimony by the complainant and stating "[o]ur careful search has revealed no case that comes close to upholding a [civil contempt fine] on such a sparse record"); *McFarland v. Gregory*, 425 F.2d 443, 449-50 (2d Cir. 1970) (vacating $7,000 compensatory sanction because it was akin to "punishment for contempt without a hearing" and remanding for a hearing and cross-examination of the witness "on whose affidavit the amount of the penalty so crucially rested").

subjective intent of [the sanctioning court],' but 'from an examination of the character of the relief itself.'" *Id.* at 828 (citation omitted). The actual "'character and purpose' of the sanction" control. *Id.* at 827.

Although some of the distinctions have remained "less clear," there are certain definitive differences between civil and criminal contempt. *Id.* A contempt order is criminal if it is "punitive," "imposed retrospectively for 'a completed act of disobedience,'" and intended "'*to vindicate the authority of the court.*'" *Id.* at 82[illegible] 829 (emphasis added and citations omitted). In addition, criminal contempt sanctions are determinate and unconditional in nature.

By contrast, a civil contempt order is typically "remedial," forward-looking in its application, and designed to coerce "compli[ance] with an affirmative command." *Id.* at 827, 828 (citation omitted). In this sense, a civil contemnor typically "'carries the keys of his prison in his own pocket'" because his penalty is voidable; he can purge his sanction through obedience. *Id.* at 828 (citations omitted).

The Court has extended this dichotomy "to the fine context." *Id.* at 829. Thus, "[a] contempt fine . . . is considered civil and remedial if it either 'coerce[s] the defendant into compliance with the court's order, [or] . . . compensate[s] the complainant for losses sustained.'" *Id.* (citation omitted). It is criminal, however, if it is flat and unconditional and "if the contemnor has no subsequent opportunity to reduce or avoid the fine through compliance." *Id.*

Flowing from these substantive distinctions are differing procedural requirements. Generally, the demands of due process are greater in criminal cases. Thus, a criminal contempt proceeding must satisfy the dictates of Fed. R.

Crim. P. 42 and must meet the constitutional safeguards required for any criminal proceeding. *See Young v. United States*, 481 U.S. 787, 798-99 (1987) (detailing the procedural requirements for criminal contempt proceedings). "Where both civil and criminal relief [are] imposed, 'the criminal feature of the order is dominant and fixes the character for purposes of review.'" *Bagwell*, 512 U.S. at 836 (citation omitted).

Here, there is no dispute that the Fourth Circuit did not adhere to the requirements for a criminal proceeding, and although the court has characterized its sanction as civil, the true "character and purpose" of the sanction are indisputably criminal: (1) the sanction was expressly sought to punish Butler and "to vindicate the integrity of the court;" (2) the focus of the proceeding was exclusively on completed past acts (*i.e.*, the *Moseley* letter and the *Cockrum* brief), not on the coercion of any future compliance; (3) the fine is unconditional and cannot be purged; and (4) neither GM nor the court ever articulated any underlying, compensable loss, other than the expenditure of attorney fees.

Indeed, the Fourth Circuit's characterization of its sanction as civil rests entirely on the proposition that its award of GM's *attorney fees* suffices to render its fine a compensatory civil sanction. This cannot be. By definition, any contempt proceeding results in the expenditure of costs and attorney fees by a non-indigent complainant. If that expenditure alone—rather than an *underlying substantive loss*—may suffice as the "compensable loss" that can render a contempt fine civil, then every criminal contempt proceeding can be converted into a civil proceeding simply by the request

and award of attorney fees.[10/]

This reasoning eviscerates any meaningful distinction between civil and criminal proceedings in cases involving contempt fines, and it vastly expands the power of the federal courts to impose such fines without proper procedural safeguards. Indeed, so long as the sanctioning court bases its fine on the complainant's attorney fees and awards the fine to the complainant (and not to the registry of the court), the very concept of a criminal contempt fine could be written out of the law. That result cannot stand.

II. The Court Should Intervene To Specify The Outer Limits of a Federal Court's Inherent Contempt Power.

A. The Fourth Circuit Erred in Failing To Recognize That Settlement of the Underlying Action Divests a Federal Court of Its Collateral Contempt Power.

There is a clear conflict among the lower courts with respect to whether the disposition of an underlying action terminates the judicial power to impose a civil contempt sanction in connection with that action.

In *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418 (1911), this Court ordered the dismissal of a civil contempt proceeding that had continued after the settlement of the

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[10/] Nor does the court's award of a fraction of GM's request for fees from the *Moseley* and *Cockrum* cases avoid this dilemma. Like the award of fees for the contempt proceeding, this award is not compensation for any underlying loss within any meaningful definition of that term. On the contrary, this award constitutes a fee-shifting order, by a foreign court, in favor of a defendant for portions of its defense costs in two underlying cases. In light of the American Rule on fee-shifting and traditional notions of judicial comity, this aspect of the award is troubling in itself.

underlying action from which it arose. As the Court explained, "when the main cause [is] terminated by a settlement of all differences between the parties, the complainant [does] not require and [is] not entitled to any compensation or relief of *any other character*." *Id.* at 451-52 (emphasis added). Accordingly, in "a proceeding in equity for civil contempt where the only remedial relief possible [is] a fine payable to the complainant," the contempt proceeding is "*necessarily ended* with the settlement of the main cause of which it is a part." *Id.* at 451, 452 (emphasis added).[11/] The Court has recently reaffirmed the continued vitality of *Gompers*, which it has recognized as a "leading early case" in its contempt jurisprudence. *Bagwell*, 512 U.S. at 827; *see id.* at 844 (Ginsburg, J., concurring).

Numerous circuit courts have also recognized—both with and without reference to *Gompers*—that "'[c]ivil contempt proceedings are considered to be a part of the action from which they stem'" and that "'there is no such thing as an independent cause of action for civil contempt.'" *D. Patrick, Inc. v. Ford Motor Co.*, 8 F.3d 455, 459 (7th Cir. 1993) (affirming the dismissal of a "complaint" purporting to state a cause of action for civil contempt) (citations omitted); *see also Finn v. Schiller*, 72 F.3d 1182, 1188 (4th Cir. 1996) (holding same); *Blalock v. United States*, 844 F.2d 1546, 1550 (11th Cir. 1988) (per curiam) (holding same); *cf. United States Catholic Conference*, 487 U.S. at 74-80.

[11/] The Court noted that a different rule applies to *criminal* contempt proceedings. Because it is pursued by the state for the benefit of the public and "to vindicate the authority of the court," a criminal contempt proceeding, where properly pursued, is "a separate and independent proceeding at law." 221 U.S. at 451. As explained above, the Fourth Circuit characterized the present case as one of civil contempt, and its sanction plainly cannot stand if it may fairly be viewed as criminal.

Here, by contrast, the Fourth Circuit directly defied *Gompers* and disagreed with the foregoing cases by refusing to dismiss this proceeding after being advised of and expressly noting the settlement of the underlying action. *See* App., 5a n.2 (noting that *Cameron* settled in December 1994). Citing Fifth Circuit authority and applying reasoning that directly contradicts *Gompers*, the Fourth Circuit suggested that the defining characteristic of "compensatory civil contempt proceedings" is precisely that they *survive* an underlying settlement because "'the need for compensation continues unredressed at the end of the underlying litigation.'" App, 8a n.3 (quoting *Petroleos Mexicanos v. Crawford Enters., Inc.*, 826 F.2d 392, 400 (5th Cir. 1987)).

Other circuits have recently reached the same conclusion, thereby expanding their inherent contempt powers in violation of *Gompers* and producing highly dubious results in the process. *See, e.g., Bush Ranch, Inc. v. E.I. DuPont de Nemours & Co.*, 99 F.3d 363, 367-68 (11th Cir. 1996) (holding that federal courts have the inherent power to adjudicate civil and criminal contempts well after termination of the actions in which those contempts arose), *petition for cert. filed*, ___ U.S.L.W. ___ (May 8, 1997) (No. 96-1777); *Reliance Ins. Co. v. Mast Constr. Co.*, 84 F.3d 372, 376 (10th Cir. 1996) (citing the Fourth Circuit order challenged in this petition and holding that expiration of a TRO does not bar "a subsequent compensatory civil contempt action" for a prior violation of that TRO); *United States v. Slaughter*, 900 F.2d 1119, 1125 (7th Cir. 1990) (holding that even coercive contempt proceedings can survive abatement of an underlying action).

If the reasoning of these latter courts is correct, then three conclusions follow: (1) the *Gompers* limitation is no longer good law; (2) there are no apparent temporal limits on when a contempt proceeding may be pursued; and (3) the right to

sue for contempt in the federal courts apparently exists as an *independent* right and does not exist solely as a *collateral* consequence of the necessary and inherent power of all federal courts to police proceedings that are otherwise pending before them. Petitioner submits that this is not the law.

B. The Fourth Circuit's Reasoning Expands the Power of the Federal Courts To Impose Sanctions to an Untenable Extreme.

The Fourth Circuit cited no authority for the invocation of its jurisdiction or the exercise of its contempt power. *See* App., 1a-9a. In response to Butler's June 30, 1995 motion to dismiss, GM invoked the court's "inherent authority," relying primarily on *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991). The court presumably found this authority sufficient.

In *Chambers*, which was not a contempt action, this Court "explore[d] the scope of the inherent power of a federal court to sanction a litigant for bad-faith conduct." *Id.* at 35. The Court held, by a 5-4 margin, that this inherent power reaches not only "conduct before the court" but also conduct "beyond the court's confines"—even if such conduct does not interfere with the conduct of a trial. *Id.* at 44. *But see id.* at 60 (Scalia, J., dissenting); *id.* at 72-76 (Kennedy, J., dissenting). The Fourth Circuit's decision takes this reasoning to an untenable extreme.

First, although it occurred "beyond the court's confines," the offending conduct at issue in *Chambers* was nonetheless intended to influence pending proceedings *before the sanctioning court*; it was vexatious behavior designed to undermine ongoing litigation in that forum. *See* 501 U.S. at 35-42. Here, there was no effort or intent to disrupt pending proceedings in the Fourth Circuit (or any other forum). Moreover, the statements for which the Fourth Circuit has

held Butler in contempt occurred not only outside its confines, but also *directly within the confines of two other courts* during ongoing proceedings before those courts, and there is no evidence of any kind that either court (*i.e.*, the Georgia state court or the Kansas federal court) took umbrage.[12/]

Accordingly, if the Fourth Circuit's decision is correct, then a federal court's inherent contempt power constitutes a nationwide power to police proceedings in other courts, irrespective of the views of those courts and the impact upon their proceedings. This means that a federal court without a pressing judicial interest of its own may sanction—as an indirect contempt of its authority—statements that are made in other judicial proceedings and that do not even constitute *direct* contempts within the confines of the courts in which they are made.[13/] This anomalous result transgresses any reasonable notion of judicial comity between the state and federal systems and between differing federal jurisdictions,

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[12/] Although *Chambers* upheld, in part, the "imposition of sanctions for conduct before other tribunals," the conduct at issue involved the pursuit of frivolous proceedings before other tribunals in an effort to impede the administration of justice by the sanctioning court. 501 U.S. at 57. That is not the case here. The *Moseley* and *Cockrum* cases were proper judicial proceedings involving plaintiffs who did not appear in the Fourth Circuit.

[13/] That the Fourth Circuit did not have a pressing judicial interest of its own in the *Moseley* letter or the *Cockrum* brief is not subject to dispute. Although, as explained above, the proceedings were intended "to vindicate the authority" of the Fourth Circuit (and hence, were impermissibly criminal), the Fourth Circuit has nonetheless characterized its ruling as civil and has stated that the purpose of its proceedings was to compensate GM. That characterization concedes, as it must, that the court had no pressing interest of its own at stake. Moreover, if the purpose of the proceedings was purely compensatory, then the Georgia state court and the Kansas federal court were undeniably better positioned to determine what compensable loss, if any, GM had suffered before them and to provide GM with any appropriate relief.

and it renders the contempt power a tool of gratuitous interference.[14/]

Second, the Fourth Circuit's reasoning has profound due process ramifications for both litigants and their lawyers. As understood by the Fourth Circuit, the inherent contempt power appears to be both the broadest and the least defined tool available to the federal courts for sanctioning misconduct. Although numerous federal rules and statutes set forth an extensive and detailed array of sanctioning powers (and although at least some of those powers and their Georgia state analogs would appear to have been available to the *Cockrum* and *Moseley* courts, respectively), none of those powers were or could have been cited or relied upon by the Fourth Circuit here.[15/] On the contrary, the Fourth Circuit apparently resorted to its "inherent power" because all of these *express* powers, which Congress has carefully delineated and provided to the courts, have explicit limits and are obviously inapplicable to the conduct in question.

Such resort to the contempt power as a "catch-all" source of judicial authority to police litigants and attorneys when other, express sanctioning powers do not apply stands in marked contrast to this Court's admonition that the inherent

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[14/] The Court recently granted certiorari in a related case to address a similar effort by GM to prevent one of its former engineers, who had testified in *Moseley*, from ever testifying further in these cases. *See Baker v. General Motors Corp.*, 86 F.3d 811 (8th Cir. 1996), *cert. granted*, 117 S. Ct. 1310 (1997). Like *Baker*, this case presents fundamental questions about what one court can prevent another court from considering.

[15/] *See, e.g.*, Fed. R. Civ. P. 11(b)-(c), 16(f), 26(g), 30(g), 37, 41(b), 45(f), 56(g); Fed. R. Crim. P. 42; Fed. R. App. P. 38, 46(b)-(c); 18 U.S.C. § 401; 28 U.S.C. § 1927. In addition to these and perhaps other federal rules and statutes, claimants alleging attorney misconduct can obviously resort to the various disciplinary mechanisms of the bar.

power to sanction exists "to fill in the interstices." *Chambers*, 501 U.S. at 46. It is also directly at odds with this Court's longstanding distrust of the contempt power and its repeated warnings that any exercise of this power must be viewed with suspicion. *See, e.g., Bagwell*, 512 U.S. at 831; *Cooke*, 267 U.S. at 539.

Finally, such a broad interpretation of the courts' inherent contempt power is particularly pernicious because, as the Fourth Circuit observed here, in contrast to the inherent sanctioning power addressed in *Chambers*, there is no "bad faith" requirement—or even a "willfulness" requirement—in the law of contempt. Contempt is a rule of strict liability, requiring only a clear order and a clear violation of that order. *See* App., 5a-6a ("Willfulness is not an element of civil contempt.") (citing *McComb*). Indeed, petitioner was not held to have acted in bad faith here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

In Re: GENERAL MOTORS CORPORATION,
a Delaware Corporation, Petitioner.

No. 94-1011.

United States Court of Appeals,
Fourth Circuit.

Aug. 8, 1995.

ORDER

On September 14, 1994, petitioner, General Motors Corporation (GM) commenced the instant proceedings by moving this court for an order requiring plaintiffs' counsel, Mr. James E. Butler, Jr. (Butler), to show cause why this court should not hold him in civil contempt, or impose other appropriate sanctions, for violating this court's order of March 23, 1994. On October 6, 1994, this court granted GM's motion and held a hearing on October 20, 1994, in order for Butler to show cause why he should not be held in contempt. For reasons that follow, we hold Butler in civil contempt of this court's order of March 23, 1994.

I

On February 28, 1994, the Honorable G. Ross Anderson entered a fifty-nine page order recusing himself from further participation in *Cameron v. General Motors Corp.*, Nos. 6:93-1278-3, 1279-3, 1280-3, 1994 WL 159408 (D.S.C. Feb. 28, 1994). In recusing himself, Judge Anderson held that a reasonable person could possibly question his "fairness and impartiality," and he accordingly vacated five outstanding discovery orders. Recusal Order at 59. In the order, Judge

Anderson also made new findings of fact and conclusions of law on the specific issues addressed in the discovery orders that he found necessary to vacate.

Due to its belief that Judge Anderson's new findings and conclusions would potentially prejudice its case, GM moved this court on March 4, 1994, for an order striking certain portions of the recusal order. On March 23, 1994, we granted GM's motion. In that order, we reasoned that it was improper for Judge Anderson to make new findings of fact and conclusions of law on the issues addressed in the vacated orders. Our March 23, 1994, order, stated in pertinent part:

> As a result, section III of the recusal order, as well as any other statements in the order relating to the possible destruction of documents, perjury by petitioner or petitioner's counsel, or applicability of the crime-fraud exception of the attorney-client and work-product privileges to the facts of this case, are hereby stricken from the order and should not hereafter be cited as authority. We also strike all findings or conclusions regarding the liability or culpability of petitioner's counsel with respect to the pending motion for sanctions under Fed.R.Civ.P. 11.

Order of March 23, 1994, at 2-3. Subsequently, the Honorable Charles H. Haden II was appointed to preside over the *Cameron* litigation.

Following this court's March 23, 1994, order, Butler continued his representation of other clients pursuing products liability actions against GM in other courts, including a state court proceeding in Fulton County, Georgia, *see Moseley v. General Motors Corp.*, No. 90-V-6276 (Sup.Ct., Fulton County, Ga.). During the course of the *Moseley* litigation, Butler submitted a nine-page letter dated August 30, 1994, to

the Honorable Albert L. Thompson, the presiding judge in the *Moseley* case. On page three of the letter in a block quotation, Butler quoted directly from language in Judge Anderson's order that this court had ordered stricken in its order of March 23, 1994. In particular, he quoted the same language that this court had used in its order to exemplify the inappropriate findings included in Judge Anderson's order. In quoting the language, Butler also highlighted certain words that were not emphasized in Judge Anderson's original order. Butler specifically quoted the following passage:

> A review of the thousands of documents in this case including in camera reviews of documents for which an attorney-client privilege was asserted reveals a *substantial likelihood* that perhaps *perjury and the systematic destruction of documents* involving gross misconduct by General Motors' regional counsel occurred. Evidence of the commission of such activity by and with the knowledge of these General Motors' regional counsel would defeat the attorney-client and work product privilege asserted by General Motors. There is clearly evidence having a sufficient foundation in fact to establish a prima facie case that the documents for which an attorney-client privilege is asserted are subject to the crime fraud exception [to the attorney-client privilege].

Letter of Aug. 30, 1994, at 3 (emphasis in letter) (quoting Recusal Order at 48). After quoting this passage, Butler cited Judge Anderson's recusal order. He also attached a complete copy of the order to the letter.[1/]

[1/] Butler also discussed Judge Anderson's findings in a brief filed on April 1, 1994, with the United States District Court for the District of Kansas in *Cockrum v. General Motors Corp.*, No. 93-1180-MLB (D. Kan.). In particular, Butler stated that "The Fourth Circuit [in its order of

(continued...)

In the paragraph following the quoted language, Butler noted that Judge Anderson had vacated several of his discovery orders in the recusal order and stated that Judge Haden in the *Cameron* case had "reinstated several of Judge Anderson's prior orders." *Id.* at 3. Additionally, in footnote eight on page eight of the letter, Butler again referenced Judge Anderson's findings, stating that "Judge Anderson found many of GM's privilege claims to be baseless, and suggested that Rule 11 sanctions should be investigated based on GM's making of such claims." *Id.* at 8 n.8. Nowhere in Butler's letter did he state that this court had stricken the portion of Judge Anderson's order he quoted and had ordered that the portion should not be cited as authority. Furthermore, nowhere in the letter did he mention that this court had stricken Judge Anderson's "findings" in relation to the liability of GM's counsel under Fed.R.Civ.P. 11.

Counsel for GM thereafter wrote Judge Thompson on September 2, 1994, and informed him that this court had stricken the language in the recusal order cited by Butler and had ordered that such findings in the order should not be cited as authority. The letter also advised Judge Thompson that Judge Haden had not reinstated the language stricken from Judge Anderson's recusal order. On September 20, 1994,

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[1/](...continued)
March 23, 1994] *did not* dispute or otherwise disagree with Judge Anderson's findings . . . in his recusal order" and that Judge Anderson had found "a substantial likelihood that perhaps perjury and the systematic destruction of documents occurred." Plaintiffs' Brief in Opposition to Defendant General Motors Corporation's Motion for Protective Order at 14. In this brief, Butler never stated that Judge Anderson's findings were stricken and were not to be cited as authority; rather, Butler stated that this court in its order did not consider the evidence of perjury or destruction of documents but "simply ruled that such findings had no place within the confines of a recusal order." *Id.*

Butler wrote to Judge Thompson apologizing for his "inexcusable and careless blunder" in including in his August 30 letter a "misleading and inaccurate" sentence, which implied that Judge Haden had adopted Judge Anderson's earlier findings that were quoted in his August 30 letter. Butler, however, did not state in the letter that this court had stricken the quoted passage from Judge Anderson's order and had ordered that the passage should not be cited as authority. Finally, on December 8, 1994, Butler sent a letter to Judge Thompson, in which he expressly informed Judge Thompson that this court had stricken the portions he quoted in the August 30 letter. Butler explained that he had not notified Judge Thompson earlier because he believed Judge Thompson was "fully apprised" that the language had been stricken due to the fact that GM had informed him as such in its letter of September 2, 1994, and the fact that, in a status conference before Judge Thompson on September 8, 1994, neither party had raised the issue of the validity of Judge Anderson's findings.[2/]

II

A

We may impose sanctions for civil contempt "to coerce obedience to a court order or to compensate the complainant for losses sustained as a result of the contumacy." *Connolly v. J.T. Ventures*, 851 F.2d 930, 932 (7th Cir. 1988); *see also United States v. United Mine Workers of America*, 330 U.S. 258, 303-04, 67 S.Ct. 677, 701, 91 L.Ed. 884 (1947). Civil contempt is an appropriate sanction if we can point to an order

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[2/] The parties in *Cameron* settled the case in December 1994. *See* Order of Dismissal, *Cameron v. General Motors Corp.*, Nos. 3:93-1278-07, 1279-07, 1280-07 (D.S.C. Dec. 30, 1994).

of this Court which "set[s] forth in specific detail an unequivocal command" which a party has violated. *Ferrell v. Pierce*, 785 F.2d 1372, 1378 (7th Cir. 1986) (citation and internal quotation marks omitted); *see also Project B.A.S.I.C. v. Kemp*, 947 F.2d 11, 16 (1st Cir. 1991) ("[C]ivil contempt will lie only if the putative contemnor has violated an order that is clear and unambiguous."). The burden is on the complainant to prove civil contempt by clear and convincing evidence. *Id.* Willfulness is not an element of civil contempt. *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191, 69 S.Ct. 497, 499, 93 L.Ed. 599 (1949).

We believe GM has satisfied its burden of demonstrating by clear and convincing evidence that Butler violated the specific and unequivocal commands of our order of March 23, 1994. In that order, we stated:

> As a result, section III of the recusal order, as well as any other statements in the order relating to the possible destruction of documents, perjury by petitioner or petitioner's counsel, or applicability of the crime-fraud exception of the attorney-client and work-product privileges to the facts of this case, are hereby stricken from the order and should not hereafter be cited as authority. We also strike all findings or conclusions regarding the liability or culpability of petitioner's counsel with respect to the pending motion for sanctions under Fed.R.Civ.P. 11.

Order of March 23, 1994, at 2-3. Our order was clear and unequivocal. We struck Part III and other portions of Judge Anderson's recusal order as inappropriate, and expressly ordered that the specified portions of the order were not to "be cited as authority." *Id.* Despite this clear command, in his letter to Judge Thompson and brief filed on April 1, 1994, with the United States District Court in the District of Kansas

in *Cockrum v. General Motors Corp.*, No. 93-1180-MLB (D. Kan.), Butler cited and quoted directly from language in Judge Anderson's order that this Court had stricken. In our view, the evidence clearly and convincingly establishes that Butler violated our clear and unequivocal order of March 23, 1994.

B

The issue is now one of remedy. The appropriate remedy for civil contempt is within the court's broad discretion. *McComb*, 336 U.S. at 193-94, 69 S.Ct. at 500-501. Remedies include ordering the contemnor to reimburse the complainant for losses sustained and for reasonable attorney's fees. *United States v. Trudell*, 563 F.2d 889, 891 (8th Cir. 1977). However, the remedies and sanctions must be remedial and compensatory and, unlike criminal contempt, nonpunitive. *United Mine Workers*, 330 U.S. at 302-04, 67 S.Ct. at 700-701. "Generally, a compensatory sanction 'may not exceed the actual loss to the complainant caused by the actions of respondent, lest the contempt fine become punitive in nature, which is not appropriate in a civil contempt proceeding.'" *In re Tetracycline Cases*, 927 F.2d 411, 413 (8th Cir. 1991) (quoting *NLRB v. Laborers' Int'l Union*, 882 F.2d 949, 955 (5th Cir. 1989)).

It is clear to us that GM has suffered a compensable loss. There is no question that GM was injured as a direct result of Butler's citation to Judge Anderson's recusal order in his August 30, 1994, letter to Judge Thompson and his brief filed in *Cockrum*. GM has expended considerable resources to correct or thwart the effects of Butler's blatant misconduct in the Georgia state court and the United States District Court for the District of Kansas. Unquestionably, Butler's letter of August 30, 1994, caused GM to incur a considerable expense to defend actions in other jurisdictions that were premised on findings and conclusions this court had stricken and

specifically ordered Butler not to cite. As a result of Butler's contumacious behavior, GM is entitled to be compensated for its expenses germinating from Butler's misconduct in the Georgia state court and the United States District Court for the District of Kansas. Furthermore, GM is entitled to reasonable costs and attorney's fees for the contempt proceeding before this court.[3/]

III

In summary, we find Butler in contempt of our order of March 23, 1994. As a result of Butler's contumacious behavior, GM is entitled to be compensated for its expenses related to correcting the effects of Butler's misconduct in the Georgia state court and the United States District Court for the District of Kansas. We also award GM reasonable costs and attorney's fees for the contempt proceeding before this court. From the date of this order, GM has twenty days to submit a summary of its expenses related to correcting the effects of

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[3/] We find no merit to Butler's contention that this court lacks the authority to find him in civil contempt because the *Cameron* case has been settled. The nature of the contempt proceeding before the court is compensatory in nature, and unlike contempt proceedings that are coercive in nature, "the termination of the underlying action out of which the contempt hearing arose does not moot the contempt proceeding." *Petroleos Mexicanos v. Crawford Enterprises, Inc.*, 826 F.2d 392, 400 (5th Cir. 1987). This critical distinction between coercive civil contempt proceedings and compensatory civil contempt proceedings "rests upon the fact that the harm or injury that gives rise to the need for compensation continues unredressed at the end of the underlying litigation while the need for getting a party to act in the underlying litigation necessarily terminates when that litigation ends." *Id.* Without question, the harm suffered by GM—expending considerable resources in other jurisdictions to curb the effect of Butler's blatant misconduct—was unredressed at the time the *Cameron* case was settled, and, therefore, this contempt proceeding is not moot.

Butler's misconduct in the Georgia state court and the United States District Court for the District of Kansas and its costs and attorney's fees for this proceeding. Butler will have ten days to respond.[4/] It is so ordered.[5/]

[4/] On June 22, 1995, eight months after Butler's show cause hearing, GM moved this court for "additional relief" relating to the contempt proceedings. In response to GM's motion, Butler filed a motion on June 30, 1995, requesting this court to dismiss the pending contempt proceedings. The court denies these motions.

[5/] If Butler has learned one thing from this proceeding, we hope it is this: the portions of Judge Anderson's recusal order which we struck in our order of March 23, 1994, are not to be cited as authority. We hope Butler will heed this admonition.

APPENDIX B

PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

February 28, 1997

No. 94-1011

O R D E R

In Re: General Motors Corporation

James E. Butler, Jr. represented numerous plaintiffs who brought products liability actions against General Motors in state and federal court. One of these actions was *Cameron v. General Motors Corp.*, from which U.S. District Judge G. Ross Anderson, District of South Carolina, recused himself.[1/] As part of his recusal order, Judge Anderson made certain factual findings, including that a review of the documents in the case revealed "a substantial likelihood that perhaps perjury and the systematic destruction of documents involving gross misconduct by General Motors' regional counsel occurred."[2/] Holding that the new factual findings were improper, in March 1994 we issued an order stating, in pertinent part:

[1/] *Cameron v. General Motors Corp.*, 1994 WL 159408 (D.S.C. Feb. 28, 1994).

[2/] *Id.* at *23.

"[S]ection III of the recusal order, as well as any other statements in the order relating to the possible destruction of documents [or] perjury by [General Motors or its counsel] ... are hereby stricken from the [recusal] order and should not be hereafter cited as authority."[3/]

Ignoring our ruling, Butler cited the stricken recusal order passages during separate proceedings before a Georgia state court and the U.S. District Court for the District of Kansas. On August 8, 1995, we found Butler in civil contempt of our earlier order and awarded General Motors reasonable costs for its efforts to correct Butler's misconduct.[4/] We referred the matter to U.S. District Judge Robert G. Doumar of the Eastern District of Virginia for a determination of the proper amount to be assessed against Butler.[5/] Judge Doumar subsequently filed a report and recommendation.

We have carefully reviewed the report, Butler's objections and General Motors' response. In order to calculate the award, Judge Doumar waded through the murky waters of legal billing. We find no error in his meticulous findings of fact or his conclusions of law.

As Judge Doumar notes, in a pun that bears repeating, if the Butler did it, the Butler pays for it. Butler may have had to pay less, however, if he had not followed an ill-advised policy of contesting each and every aspect of this contempt proceeding. Judge Doumar recommends awarding General Motors $24,894.50 for its legal costs in correcting the effects

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[3/] Order of March 23, 1994 at 2-3 (quoted in *In re General Motors Corp.*, 61 F.3d 256, 275) (4th cir. 1995)).

[4/] *General Motors*, 61 F.3d at 259-60.

[5/] Order of September 11, 1995.

of Butler's misconduct, and $165,646.81 for its legal costs stemming from this contempt proceeding. Butler, of course, had the right to put on a vigorous defense. But in the aftermath of our decision to hold Butler in contempt, a conciliatory stance on some issues would have softened the blow of this order by reducing General Motors' overall legal expenses.

For the foregoing reasons, we adopt Judge Doumar's report and recommendation in its entirety and award General Motors a total of $190,541.31.

With the concurrence of Judge Hamilton and Judge Williams,

/s/
U.S. Circuit Judge Donald Russell

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 94-1011

IN RE: GENERAL MOTORS CORPORATION,

United States District Court for the
District of South Carolina, Columbia Division
Civil Action No. 3-95-3236-16

FINAL REPORT AND RECOMMENDATION
UNDER SEAL

This matter has been referred to the Court by the Fourth Circuit for a determination as to the appropriate civil contempt amount that should be assessed against a lawyer, Mr. James E. Butler ("Butler" or "Respondent"). The final response having been filed on May 20, 1996, this case is ripe for decision. The Court DENIES Respondent's motion for an evidentiary hearing. This Court recommends that Petitioner receive $18,897.50 for the harm caused by Respondent's contempt in *Moseley v. General Motors*, $5997.00 for the harm caused by Respondent's contempt in *Cockrum v. General Motors*, and $165,646.81 in attorneys' fees for this contempt proceeding. Thus pursuant to the Fourth Circuit's directive, this Court recommends that Petitioner be awarded a total of $190,541.31 against the Respondent, including attorneys' fees through January 30, 1996.

PROLOGUE

> Revenge is a kind of wild justice, which the more man's nature runs to, the more ought law to weed it out.[1/]

The issues in this case have been so much like every case the Court has ever seen before, and yet at the same time, its parts have been quite exaggerated, so that the entirety has been like no other case over which the Court has presided. When all is said and done, however, the matter is simply one of attorneys' fees: what actions did Butler's contempt reasonably force General Motors' counsel to undertake, and what were the reasonable fees for General Motors ("GM") to prosecute this action to right the scales.

1/ Francis Bacon, "Of Revenge," *Essays or Counsels, Civill and Morall* (1625).

Likely typical of many federal district judges, the Court estimates that it passes on between sixty and one hundred fee applications per year for attorneys representing indigent criminal defendants and parties in civil rights cases.[2/] Thus the Court would further estimate that the average federal judge in this district spends between five and ten percent of his or her time considering and passing on applications for fee awards. The Court has become quite knowledgeable of the standards set forth in this Circuit in *Barber v. Kimbrell's, Inc.*, 577 F.2d 216 (4th Cir.), *cert. denied*, 439 U.S. 934, 99 S. Ct. 329 (1978).

At this point a little background of the present case would be instructive. Butler represented numerous plaintiffs across the country in state and federal courts who sued GM after accidents occurred in their C/K pickup trucks which resulted in gasoline tank explosions. The discovery of certain information by plaintiffs' attorneys caused them to believe that young GM attorneys, who have been derisively called by some individuals "fire babies," had destroyed or hidden documents relating to GM's liability for those fires, or committed perjury relating to the alleged destruction of documents. Judge Anderson was referring to these alleged incidents of misconduct in *Cameron*. The Fourth Circuit thereafter struck that part of Judge Anderson's order, yet Butler cited the stricken language on at least two occasions.

Given that background, the present matter between Butler, one of the country's most successful trial attorneys, and General Motors, one of the world's largest industrial

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[2/] The Eastern District of Virginia, to which the undersigned is permanently assigned, is one of the few districts which has no public defenders and relies upon panel attorney for indigent criminal representation, with the attendant fee requests.

corporation, has posed no great problems for the Court at its most basic level, fees. Now that the Court has finally come to the point where it may reach these most elemental questions, the Court can honestly say that it has judged the fairness and equity, as well as the legal requirements, for each and every task claimed by General Motors, and has reached what it believes is the most appropriate outcome. It has read what it believed to be the pertinent portions of the transcripts in various hearings as well as reviewed the documents as filed in all of the relevant cases. Looking back on the process to get to this point, however, the Court also sees, with the perfect clarity that hindsight affords, the exaggerations that have come to make this case so time-consuming. This too may be whittled down to what the Court believes has created so much difficulty: hubris. The resultant conflict between GM and its customers arising out of the truck fires put at issue literally hundreds of millions of dollars in tort awards. Thus lawyers' fees in this vast expanse of litigation would rise into the millions on both sides, and the parties in this action were the major contestants. With enormous awards (and contingent fees), it is by no means an exaggeration that these suits became personal to the lawyers involved. Each opponent felt it necessary to field an army of attorneys. Thus the stage was set for the battles with Butler and his team of attorneys on one side and GM's team on the other.

It appears to the Court that at some point during all of this litigation, the attorneys chose to attack each other personally. Though the Court does not doubt that the issue may have been relevant to the plaintiffs' cases, it certainly made for better publicity and no doubt was used to persuade GM to approach the bargaining table, regardless of whether GM believed the allegations had any merit. Like the escalation during any war, when Butler and his team began attacking the professionalism and ethics of General Motors' attorneys on a public and national scale, General Motors felt

that it had to defend itself and its lawyers by responding with a similar attack on the plaintiff's main counsel, Butler. As counsel for GM stated at oral argument,

> the gravamen of the complaint [was] possible perjury, possible obstruction of justice. Your honor, that is an allegation of possible crimes. Quite apart from what impact that may have in product liability litigation, it goes to integrity, the integrity of the company, its 800 thousand men and women, and then the integrity of its outside lawyers. Some very fine lawyers from across the country. And let us not kid ourselves.... This was the battleground, the national battleground that Mr. Butler chose .... The stakes, your Honor, were [extra]ordinarily high because that was profoundly wrong. Profoundly wrong.

Transcript of January 30, 1996, hearing, at 53-54. Thus when Butler attacked General Motors' counsel, GM responded and attacked Butler. In any war between attorneys, and this case has been no exception, justice has a tendency to become obscured while personalities predominate.

All of which brings us to the present action, in which Butler responded to GM's petition, fighting every step of the way. In this Court he has seen fit to attack each and every item and each and every ruling, including those of the Fourth Circuit which this Court must and will follow. This tactic has often been referred to as the "Stalingrad Defense," named after the Soviet defenders of that city during the German eastern offense in World War II—give up not a single inch, and eventually the opposition may be beaten down into submission by not only the cold, unforgiving winter, but also by the sheer tenacity and persistence of the defenders. What was obvious was that the opponents here came in with such large numbers of attorneys that the Court was concerned, by

virtue of the number of participants, whether the battle was to be physical rather than verbal. Although nothing of that nature appeared at oral argument, the distrust was evident.

Chapter I: The History

> Truth often suffers more by the heat of its defenders than from the arguments of its opposers.[3/]

The Court has visited the history of these proceedings numerous times previously. Yet in hopes of finding a clear and complete end in this Court, we struggle onward, "Once more unto the breach, my friends, once more."[4/]

On September 14, 1994, GM commenced these proceedings before the Fourth Circuit by moving the Fourth Circuit for an order requiring Butler's counsel to show cause why the Fourth Circuit should not hold Butler in civil contempt for violating the Fourth Circuit's order of March 23, 1994 ("March 23rd Order").[5/] A hearing was held before the Fourth Circuit on October 20, 1994, and the Fourth Circuit issued an order and opinion holding Butler in civil contempt on August 8, 1995 ("Contempt Order"). *In re General Motors Corp.*, 61 F.3d 256 (4th Cir. 1995). That order provides the basis for the proceedings in this Court.

In February of 1994, the Honorable G. Ross Anderson of

[3/] William Penn, *Some Fruits of Solitude* (1693).

[4/] William Shakespeare, *King Henry the Fifth*, act III, sc. i (1600).

[5/] For a full and complete understanding of all of the proceedings to date and all arguments made by both parties, one should review this order in conjunction with the Court's most recent order, signed April 26, 1996.

the District of South Carolina entered an order recusing himself from further participation in *Cameron v. General Motors Corp.* In his recusal order, *inter alia*, Judge Anderson made certain factual findings, including the following statement:

> A review of the thousands of documents in this case including in camera reviews of documents for which an attorney-client privilege was asserted reveals a substantial likelihood that perhaps perjury and the systematic destruction of documents involving gross misconduct by General Motors' regional counsel occurred.

61 F.3d at 257.[6/] Because the Fourth Circuit believed that the new factual findings and legal conclusions in Judge Anderson's recusal order were improper, the Fourth Circuit struck certain portions of the recusal order. The Fourth Circuit's March 23rd Order stated in pertinent part:

> As a result, section III of the recusal order, as well as any other statements in the order relating to the possible destruction of documents [or] perjury by [GM or its counsel] ... are hereby stricken from the order *and should not be hereafter cited as authority*.

61 F.3d at 257 (quoting March 23rd Order, at 2-3) (emphasis added). Butler continued his representation of other clients pursuing products liability actions against GM in other courts, including two which are relevant here: a Georgia state court proceeding in *Moseley v. General Motors Corp.* (No. 90-V-6726, Sup. Ct., Fulton County, Ga.), and a proceeding

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[6/] The Honorable Charles H. Haden, II, took over the *Cameron* litigation subsequent to Judge Anderson's recusal.

in the United States District Court for the District of Kansas in *Cockrum v. General Motors Corp.* (No. 93-1180-MLB, D. Kan.).

In a brief filed in *Cockrum* on April 1, 1994, Butler cited the stricken language from Judge Anderson's recusal order and failed to state that such language had been stricken by the Fourth Circuit in its March 23rd Order, but stated that the Fourth Circuit *did not* dispute Judge Anderson's findings in that order. 61 F.3d at 257-58 n.1. Prior to the Fourth Circuit's March 23rd Order, Butler had moved for depositions of GM counsel, citing Judge Anderson's recusal order. GM then moved for a protective order. Immediately after the Fourth Circuit struck Judge Anderson's findings, GM filed a supplemental brief in support of its motion for a protective order. In this supplemental brief, GM argued that the attorney depositions should be disallowed, and called attention to and attached the Fourth Circuit's order of March 23rd. *See* Supplemental Memorandum, filed March 23, 1994, attached as Exhibit D to Affidavit of Peter J. Daughtery. The offending brief was filed on April 1, 1994, as a response to GM's supplemental brief, and discussed both the Fourth Circuit's order and Judge Anderson's factual findings in the context of responding to GM's supplemental brief, arguing that those underlying factual findings by Judge Anderson had not necessarily been undercut. GM filed a reply brief, part of which took issue with Butler's interpretation of the March 23rd Order. This was one incident of contempt of the Fourth Circuit's March 23rd Order with which the Fourth Circuit took issue in the Contempt Order.

In *Moseley*, the Georgia Court of Appeals reversed a significantly-sized jury award against GM resulting from a jury trial presided over by the Honorable Albert L. Thompson in state court in Georgia. Butler was plaintiff's counsel in that case as well. One basis for the reversal was that a certain

deposition, arguably related to plaintiff's claim of document destruction, was used at trial by plaintiff, but the deposed party was unavailable for cross-examination by GM because of his death. *General Motors Corp. v. Moseley*, 447 S.E.2d 302, 307-08 (Ga. App. 1994). Thus the *Moseley* matter was before Judge Thompson to proceed to a new trial, and the issue had come up in the autumn of 1994 as to whether there should be additional discovery before the new trial. This is where the issue of attorney depositions was raised by Butler. In a letter dated August 30, 1994, to Judge Thompson, the presiding judge in the *Moseley* case on remand as well, Butler again quoted stricken language from Judge Anderson's recusal order. The Fourth Circuit described this behavior as follows:

> In particular, [Butler] quoted the same language that this court had used in its order to exemplify the inappropriate findings included in Judge Anderson's order. In quoting the language, Butler also highlighted certain words that were not emphasized in Judge Anderson's original order....
>
> In the paragraph following the quoted language, Butler ... stated that Judge Haden in the Cameron case had "reinstated several of Judge Anderson's prior orders." ... Nowhere in Butler's letter did he state that this court had stricken the portion of Judge Anderson's order he quoted and had ordered that the portion should not be cited as authority.

61 F.3d at 257-58 (quoting Respondent's letter of August 30, 1994). Counsel for GM by letter subsequently informed Judge Thompson of the specifics of the March 23rd Order by the Fourth Circuit, and also advised Judge Thompson that Judge Haden had not reinstated the language stricken from Judge Anderson's recusal order. Eventually, in December of 1994, Butler did explicitly and personally formally inform Judge Thompson by letter of the Fourth Circuit order. *Id.*

This was the other, and more audacious, incident of misconduct with which the Fourth Circuit took umbrage.

The Fourth Circuit reviewed the above facts and then held in its Contempt Order of August 8, 1995, that "GM has satisfied its burden of demonstrating by clear and convincing evidence that Butler violated the specific and unequivocal commands of our order of March 23, 1994." *Id.* at 258. The Contempt Order then discussed the appropriate remedy, and found that a compensatory sanction was appropriate, which generally "may not exceed the actual loss to the complainant caused by the actions of Respondent, lest the contempt fine become punitive in nature, which is not appropriate in a civil contempt proceeding." *Id.* at 259 (quoting *In re Tetracyclene Cases*, 927 F.2d 411, 413 (8th Cir. 1991) (quoting *N.L.R.B. v. Laborers' Int'l Union of North America*, 882 F.2d 949, 955 (5th Cir. 1989))). The Fourth Circuit's Contempt Order concludes the following:

> It is clear to us that GM has suffered a compensable loss. There is no question that GM was injured as a direct result of Butler's citation to Judge Anderson's recusal order in his August 30, 1994, letter to Judge Thompson and his brief filed in *Cockrum*. GM has expended considerable resources to correct or thwart the effects of Butler's blatant misconduct in the Georgia state court and the United States District Court for the District of Kansas. Unquestionably, Butler's letter of August 30, 1994, caused GM to incur a considerable expense to defend actions in other jurisdictions that were premised on findings and conclusions this court had stricken and specifically ordered Butler not to cite. As a result of Butler's contumacious behavior, GM is entitled to be compensated for its expenses germinating from Butler's misconduct in the Georgia state court and the

> United States District Court for the District of Kansas. Furthermore, GM is entitled to reasonable costs and attorney's fees for the contempt proceeding before this court.

61 F.3d at 259 (footnote omitted). In the footnote omitted from the above-quoted passage, the Fourth Circuit rejected Butler's argument that civil contempt is inappropriate where the underlying case in the Fourth Circuit, *Cameron*, had previously been settled. The Fourth Circuit stated that "[w]ithout question, the harm suffered by GM ... was unredressed at the time the *Cameron* case was settled, and, therefore, this contempt proceeding is not moot." *Id.* at 259 n.3. Thus it is clear that the Fourth Circuit found significant injury to GM, yet the Fourth Circuit left open exactly where and in what manner this harm occurred.

The Fourth Circuit ordered GM to file a "summary of its expenses related to correcting the effects of Butler's misconduct in the Georgia state court and the United States District Court for the District of Kansas and its costs and attorney's fees for [the contempt] proceeding." *Id.* at 260. In its final footnote, the Fourth Circuit stated, "[i]f Butler has learned one thing from this proceeding, we hope it is this: the portions of Judge Anderson's recusal order which we struck in our order of March 23, 1994, are not to be cited as authority. We hope Butler will heed this admonition." *Id.* at 260 n.5.

As ordered by the Fourth Circuit, General Motors subsequently filed its "Summary of Expenses" with the Fourth Circuit on August 28, 1995. The three-page summary expressly excluded any costs or other expenses, but only included attorneys' fees relating to the three matters to which the Fourth Circuit had referred: the contempt proceeding, *Moseley* and *Cockrum*. The Summary broke down its

requested total of $212,739.75 into matter, law firm, number and level of attorney (or paralegal), dates worked and total number of hours worked by each firm on each matter. The Summary further stated that if the Fourth Circuit desired, GM would be willing to submit more detailed information *in camera* and under seal, as it claimed that such detailed information was protected by the attorney-client privilege and the work product doctrine, as well as the fact that Butler continued to represent other clients in pending lawsuits against GM.

Butler filed his opposition to GM's Summary with the Fourth Circuit on September 7, 1995. Butler argued that GM's Summary had no factual or legal support for the amounts claimed, and that due process required GM to prove the fact, amount and causal nexus of the injury GM suffered. If GM did not prove its actual losses, the sanction would be punitive, Butler argued. Because GM's Summary did not identify specific tasks performed by any of the attorneys, Butler claimed, it did not address the harm actually caused by Butler and therefore could not be the basis for a civil contempt sanction. Butler further argued that due process required more than *in camera* review as Butler must be allowed to challenge GM's claims. Butler charged that there was *prima facie* evidence that no harm occurred in *Moseley* and *Cockrum*, and that the civil contempt proceeding was an attempt by GM to harass Butler and discourage him from aggressively representing his other clients against GM. Butler further stated that GM's Summary failed to even satisfy the standards in the Fourth Circuit for attorney's fees requests, citing *Barber v. Kimbrell's, Inc.*, 577 F.2d at 226 & n.28.

To support his arguments, Butler cited two examples of claims in GM's Summary which were purportedly facially suspect. Butler argued that, aside from the fact that lawyers in the firm of Kirkland & Ellis spent an extraordinary number

of hours on the contempt proceeding alone (472.5 hours), the average hourly rate (approximately $215) exceeded that of the normal charge for both paralegals and associates. Butler's second example was that among the list of dates on which attorneys from the law firm of Nelson, Mullins, Riley & Scarborough, L.L.P., worked on the contempt proceeding were tasks performed in July, 1994, each more than a month prior to Butler's letter to the *Moseley* court. Thus Butler argued that these days could not have been spent on the civil contempt proceedings.[7/] Butler pointed to these alleged irregularities as two examples of "facially suspect" claims and argued that an evidentiary hearing was necessary.

Butler had also submitted to the Fourth Circuit a motion for an evidentiary hearing. This motion raised most of the issues already discussed. It also raised a number of arguments against *any* finding of harm to GM: for example, the Fourth Circuit could not presume that the *Moseley* and *Cockrum* courts were misled by Butler. The motion also quoted a number of supporting affidavits and declarations which purported to call into question any finding that these courts were misled or that damage occurred. Finally, Butler argued in the motion that GM claimed attorneys' fees in *Moseley* for dates predominantly after GM's counsel submitted a letter to the Georgia court in *Moseley* which notified that court of Butler's "misstep." If GM counsel's letter was successful, Butler argued, GM could not show what these attorneys were "correcting," because there was nothing left to correct. The motion requested a referral to an appropriate district court for an evidentiary hearing.

[7/] It is noted that this Court in this opinion has awarded a total of 3.1 hours for associate research which was utilized in this case where the research occurred prior to the *Moseley* letter. *See*, infra, objection 16.

GM responded by arguing that the issue of whether harm had occurred was already decided in GM's favor by the Fourth Circuit in its Contempt Order, and therefore was foreclosed by the law of the case. GM also argued that the Fourth Circuit was eminently capable of determining the amount of GM's loss, and therefore a referral of the matter to a district court and an evidentiary hearing would be unnecessary and wasteful. GM further cited authority supporting its claim that GM's detailed legal bills were covered by the attorney-client privilege and/or the work product doctrine. Finally, GM argued that Butler's due process rights were not violated by the proceedings in the Fourth Circuit. Thus GM concluded that the Fourth Circuit was capable of and should determine GM's compensable losses, making remand and an evidentiary hearing inappropriate and unnecessary. GM restated its willingness to provide additional information to the Fourth Circuit via *in camera* review.

On September 11, 1995, the Fourth Circuit addressed Butler's request for a more complete justification of GM's charges, and for a reasonable opportunity to respond to GM's justifications. Fourth Circuit's September 11th Order ("Referral Order"), at 1. The Fourth Circuit stated the following in its Referral Order:

> After due consideration, we do hereby refer the petition of General Motors for review and determination of the proper amount to be assessed against the respondent under the contempt decision ordered by us herein to United States District Judge Robert G. Doumar ..., with all the power and prerogative incident to such assignment.
>
> The motion of respondent for extension of time for responding to the petition of the petitioner General Motors for the assessment of proper charges

> against the respondent Butler is also referred for decision by Judge Doumar. In the meantime, the time for filing his objections to the charges by the respondent is extended from September 7, 1995, with authority in Judge Doumar to fix the time for filing Butler's response to General Motors' proposed charges herein.

The Fourth Circuit did not directly address Butler's motion for an evidentiary hearing, but instead referred the matter to a district court as requested by Butler.

This Court ordered, on September 28, 1995, each party to submit relevant materials *in camera* and under seal. Each party complied with the Court's order. Butler then moved for an order compelling the production of the settlement agreements between General Motors and the plaintiffs in the *Moseley* and *Cockrum* cases. The motion for an order compelling production of the settlement agreements was denied on numerous grounds, but primarily because the Court could not contemplate a single theory of relevance of those settlement agreements to the present matter which would not have raised serious and immediate concerns over Butler's ethical conduct in counselling his clients to agree to those settlements. *See* Opinion dated December 12, 1995.

After receiving the initial wave of briefs *in camera* from the parties, the Court decided that each party should be able to hear and respond to the arguments raised by the other. The Court therefore ordered the parties to brief the issues according to a briefing schedule set by the Court and, further, to reply to interrogatories developed by the Court to focus on the heart of the present matter. GM was ordered to put forth its arguments on privilege and work product, and to restate its claimed expenses so that Butler would have the opportunity to respond. Butler took advantage of this opportunity to raise the

issues of due process, waiver, and the propriety of the contempt sanction. GM in turn was given the opportunity to reply to Butler's arguments on these issues.

As the Court has stated, the interrogatories were drafted and ordered to focus the parties on the issues that the Court believes are key to the determination of the amount of harm caused by Butler by his misconduct in *Moseley* and *Cockrum*. GM was ordered to respond to the following interrogatories:

1. GM claims that Butler's letter to Judge Thompson in *Moseley*, despite GM's immediate response letter, caused that court to *sua sponte* order the deposition of certain GM counsel, and has claimed that Butler's letter was the only support in the record for such an order. What was the result of GM's responses to Butler's letter, i.e., was GM counsel ultimately deposed? Further, what filings, motions, etc., were precipitated by Butler's misconduct in the *Moseley* court?

2. GM alleges that the brief in *Cockrum* referred to the stricken language as a "judicial finding" of misconduct by GM attorneys. What filings, motions, etc., were precipitated by Butler's misconduct in the *Cockrum* court?

Butler was ordered to answer the following interrogatory:

1. What support in the *Moseley* record was there for the order deposing GM counsel?

The Court then held oral argument on Respondent's motion for an evidentiary hearing at Norfolk, Virginia on January 30, 1996. There counsel for Butler conceded that the hourly rates charged by General Motors' outside counsel were

reasonable. Thus eliminated as an issue in this case are the reasonableness of those hourly rates. The Court also attempted, by referring the parties to a meeting with United States Magistrate Judge Tommy E. Miller, to have the parties work out a settlement of the matter. Though the undersigned took no part in and never was privy to those discussions, it was clear when the parties returned to open court before the undersigned that no settlement was possible. The Court surmises that the issue had become at that point, and remains so today, one of pride for the parties involved.

Subsequent to oral argument, the Court ordered GM to submit its actual bills relating to its claimed expenses *in camera* and under seal, and include a section proposing certain materials which would be transmitted to Respondent so that Respondent could fairly attack the validity of any claims made by GM. With respect to the actual bills, the Court ordered GM to disclose whether GM received any discounts or paid any premiums for the work done by its outside counsel, so that Butler would only be required to pay for costs actually incurred by General Motors. GM submitted certain bills, as well as the detailed expenses of the work performed in the contempt proceeding in this court (which had not previously been submitted), and the proposed submission. The Court ordered GM's proposed submission to be transmitted in full to Respondent *under seal* and pursuant to a protective order, and ordered all subsequent filings be covered by such protective order.

The Court then afforded Respondent an opportunity to reply to GM's detailed submission, stating that Respondent must "respond in the form of objections to particular tasks or particular dates, and [to submit] any documentary evidence that Respondent reasonably believe[d could] rebut these charges." Order of March 5, 1996, at 2. Butler responded to the Court's directive. He listed numerous general and

specific objections, but nowhere attended to the second part of the Court's order, to submit further evidence. *See* "Respondent James E. Butler's Response to Petitioner's 'Tab E' Submission," dated April 1, 1996, and "Respondent James E. Butler's Response to the Court's Order of April 26, 1996," dated May 8, 1996. In fact, Butler expressly stated that "[a]ll of the documentary evidence on which Respondent relies herein is already on file with the Court." "Respondent James E. Butler's Response to Petitioner's 'Tab E' Submission," dated April 1, 1996, at 2 n.2. *Thus no other evidence need be submitted.* Butler also again raised his motion for an evidentiary hearing, argued that his due process rights would be violated if the Court awarded GM any amount, and did in fact object to a few specific items claimed by GM. GM replied by responding to each of Butler's objections. But evidently the evidentiary hearing requested by Butler was to be without evidence. Clearly whether the tasks were actually performed by GM's counsel is not contested, but merely whether they were sufficiently related to the present matter. All the necessary information has been provided to address this particular issue. There is nothing that would be provided by any evidentiary hearing other than for a few hours of bickering.

Subsequent to Respondent's response, the Court reviewed and compared GM's *in camera* submissions to the detailed submission that was transmitted to Respondent. Because the Court found that a small number of the detailed descriptions left out information that remotely might have aided Respondent in making objections to those particular tasks, the Court offered GM a choice: withdraw the particular items or resubmit to Respondent the full descriptions as submitted to the Court *in camera*. The Court had reviewed the tasks and found that certain task descriptions were not fully explanatory in what they entailed and requested further information. In a separate part of that order, the Court found that the detailed

fee information at issue was covered by both the attorney-client privilege and the work product doctrine. The Court further found, however, that GM had waived these protections insofar as the *Moseley* and *Cockrum* matters were concerned by bringing this action in the Fourth Circuit. The Court resolved the issue by finding that the waiver was limited to only that information necessary for Respondent to make adequate objections to particular tasks, did not apply to the names of particular attorneys performing work or the rates charged for each, and did not affect the protective order previously imposed to cover all of the relevant material. Where objections were made, the Court read pertinent portions of the actual transcripts and documents.

GM answered the Court's most recent order by withdrawing its claims to amounts represented by the tasks which the Court had identified as requiring further explanation. Butler subsequently responded with general objections covering the entire proceeding, as well as specific objections to each item claimed by GM. GM has now replied to these general and specific objections. Each party's arguments on what occurred in *Moseley* and *Cockrum* can now be briefly summarized.

In *Cockrum*, Butler argues that he withdrew the motion for attorney depositions before the Court there acted upon the motion. Thus he contends that the judge in *Cockrum* never had any opportunity to be, and could not have been, influenced by the brief. Furthermore, Butler has argued that only three of the thirty-three pages of GM's reply brief addressed Butler's contempt, thus GM's request for over $50,000.00 in fees is patently unreasonable. GM has responded by arguing that the actions of the tribunal in *Cockrum* is not the issue. Rather, the issue is what actions were GM counsel forced to undertake in response to Butler's brief. GM claims that the brief in reply was necessary and

reasonable, stating the national impact of an unfavorable ruling, given the attacks on the integrity of GM and its counsel.

As for *Moseley* it is clear that Butler's letter on August 30, 1994, to Judge Thompson of the Georgia state court caused at least one initial response by GM, which included the Frank Jones letter of September 2. GM further argued, however, that despite the response letter, Butler's initial letter caused the Georgia tribunal to order, on October 4, 1994, the depositions of various GM counsel. GM claimed that there was no support in the record for such an order, and more importantly, there had never even been a motion by Butler, plaintiff's counsel, for such an order. Thus GM argued that the only support for this arguably "sua sponte" order was Butler's letter citing the language of Judge Anderson which was subsequently stricken by the Fourth Circuit. In response to this allegedly drastic and out-of-the-ordinary order, GM argued that it was forced to spend tens of thousands of dollars to prevent these depositions from occurring by moving to vacate the October 4th order and moving for numerous protective orders, as well as drafting a writ of mandamus, which was never filed. GM claimed that the precedential value of enforcement of such an order would have had national impact upon GM, thus a quick and thorough response was required.

In rebuttal, Butler presented the affidavit of Judge Thompson's law clerk at the time, Monique Walker. She stated that she worked on the *Moseley* case and that she personally received both Butler's letter of August 30th and GM's letter of September 2nd while Judge Thompson was on vacation. When the judge returned on September 6th, she stated that he received them both at the same time from her. She also stated that the judge received a copy of the Fulton County Daily Report, and in her experience he read it daily.

The September 1, 1994 Daily Report's main headline was "Butler Wins Right to Depose GM Lawyers" which discussed Judge Haden's order, as well as the Fourth Circuit having stricken the findings of Judge Anderson. Butler argued that this information showed that Judge Thompson had no opportunity to be misled by Butler's letter.

Butler also produced the affidavit of Lee Tarte Wallace, an attorney in Butler's firm, who stated that he was at a hearing on September 8th before Judge Thompson in the *Moseley* matter prior to Judge Thompson's order to depose counsel, and stated that no one mentioned Butler's reference to the stricken findings. Butler argued that this showed that GM's counsel must have believed that Butler's misconduct had been adequately cured by its earlier letter. Attached to Wallace's affidavit were copies of numerous newspaper articles reporting on Judge Anderson's findings, as well as the Fourth Circuit's striking of those findings.

GM replied that the issue is "whether it was reasonable for GM to conclude that Butler's letter inflamed Judge Thompson against GM, notwithstanding GM's response to Butler's letter." Thus GM contended that its subsequent filings were intended to set the record straight. GM also stated that it did not claim all of its fees in responding to Judge Thompson's order, but limited its claim to the narrower issue of Butler's misconduct.

The Court is finally satisfied that all of the necessary evidence has been presented, through the transcripts and documents file herein by all parties, and determines that any more argument would be redundant and wasteful. Respondent's motion for an evidentiary hearing is therefore ripe for decision.

Chapter II: Must We Have an Evidentiary Hearing?

> The voice of the intellect is a soft one, but it does not rest until it has gained a hearing.[8/]

Butler has ample information to attack the claims of harm and effect submitted by Respondent, yet Butler continues to argue that due process requires a formal evidentiary hearing and other procedural safeguards. He cites *International Union, UMWA v. Bagwell*, 114 S. Ct. 2552 (1994) for this proposition. In *Bagwell*, the Supreme Court stated that civil contempt proceedings leave the offended judge solely responsible for identifying, prosecuting, adjudicating, and sanctioning the contumacious conduct, and therefore should be closely scrutinized. *Id.* at 2561. The Court explicitly stated, however, that it was not discussing compensatory sanctions, which are the issue here. *Id.* at 2563. Furthermore, the steps of "identifying," "prosecuting" and "adjudicating" have already been performed by the Fourth Circuit in this case. Respondent is reminded that we are here only having been directed to address GM's expenses related to correcting the effects of his misconduct and to award reasonable attorney's fees in this proceeding.

Butler also points to *Hathcock v. Navistar*, 53 F.3d 36 (4th Cir. 1995), to support his position that due process requires an evidentiary hearing in this matter. In *Hathcock*, the Fourth Circuit was addressing contempt under Rule 37 of the Federal Rules of Civil Procedure, however, which deals exclusively with discovery abuses. There the Court recognized that a Rule 37 fine is effectively a *criminal* contempt sanction, requiring notice and an opportunity to be heard. 53 F.3d at 42. Thus the case is inapposite to the one

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[8/] Sigmund Freud, *Future of an Illusion* 93 (W.D. Robson-Scott trans., 1949) (1928).

sub judice. Similarly, Butler cites *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 100 S. Ct. 2455 (1980), for the statement that "attorney's fees certainly should not be assessed lightly or without fair notice and an opportunity for a hearing on the record." 447 U.S. at 766-67, 100 S. Ct. 2464. However, this statement also arose in the context of a fee award as a sanction for discovery abuses under Rule 37, therefore by definition (in the Fourth Circuit, at least,) was criminal in nature. 447 U.S. at 763-765, 100 S. Ct. 2464-65. *See also McFarland v. Gregory*, 425 F.2d 443, 449-50 (2d Cir. 1970) (same).

Butler next argues that *Allied Materials Corp v. Superior Prods. Co.*, 620 F.2d 224 (10th Cir. 1980), shows that the impending sanction against Butler requires more process than that already provided. In *Allied Materials*, the Tenth Circuit vacated a $12,000 compensatory contempt award that was based on vague and self-serving oral testimony of the complainant. *Id.* at 227. The only evidence of the damage before the court was the testimony of the injured party, who stated that the costs were "probably" ten or twelve thousand dollars, but definitely at least seven thousand. The district court had relied on this testimony to assess a $12,000 civil compensatory contempt sanction. The Tenth Circuit found the $12,000 award too speculative, and allowed complainant a choice of accepting a reduced award to $7000 or to retry the harm issue on remand. *Id.* at 226-27. It is therefore not helpful to Respondent that in *Allied Materials*, the Court would have affirmed an award based almost exclusively on the speculative and admittedly inexact oral testimony of the injured party. *Id.* at 227. Respondent has failed to show that due process requires any more than that already provided in these protracted proceedings.

GM certainly bears the burden of proving both the fact and the amount of its losses as well as how Butler's conduct

proximately caused those losses. *Buffington v. Baltimore County*, 913 F.2d 113, 135 (4th Cir. 1990), *cert. denied*, 499 U.S. 906, 111 S. Ct. 1106 (1991) (stating that such a fine compensates the victim for losses they incurred as a result of the violation of the duty). If GM is not held to this burden, the fine imposed would become criminal in nature rather than civil. *See In re Kave*, 760 F.2d 343, 351-52 (1st Cir. 1985) (holding that where a fine is not determined to be the reasonable costs for losses caused, the fine is punitive in nature). This Court has already held that GM must show such a causal connection, and this order holds GM to this burden.

In *Commodity Futures Trading Commission v. Premex, Inc.*, 655 F.2d 779 (7th Cir. 1981), the Seventh Circuit held that "the refusal to grant a full evidentiary hearing did not constitute a due process denial where the documentary evidence presented ... was more than sufficient to establish contemptuous conduct." *Id.* at 782 n.2. In that case, the lower court determined its award based on affidavits as to the number of hours expended and the related hourly rate. *Id.* at 786. Similarly, in *Morales-Feliciano v. Parole Bd. of the Comm. of P.R.*, 887 F.2d 1 (1st Cir. 1989), *cert. denied*, 494 U.S. 1046, 110 S. Ct. 1511 (1990), the First Circuit held that a matter can adequately be "heard" on the papers submitted to the Court if, given the nature and circumstances of the case, the parties had a fair opportunity to present relevant facts and arguments to the court, and to counter the opponent's submissions. *Id.* at 6-7. The procedures in this Court fall well within that envisioned in *Premex* and *Morales-Feliciano*. No more process is due.

The Court has afforded Respondent numerous opportunities to state exactly why an evidentiary hearing is necessary; not in the abstract, amorphous principles of due process, but rather precisely what witnesses Butler believes he would need to call or what evidence would need to be

produced. He has identified not a single individual whose live testimony would aid the Court's decisional process. The Court also afforded Respondent every opportunity to put forth documentation and other written evidence which would rebut GM's claims. He has put forth a few affidavits, which have been discussed above, and identified certain documents in response to the Court's interrogatory. However, Butler stated that all of the information upon which he relies is already before the Court and has failed to identify any other type of evidence necessary. Once the sun burns through the fog of Respondent's persistent arguments supporting his demand for an evidentiary hearing, we are left with only one conclusion: "there is no there there."[9/]

When taken to task, however, Butler was forced to concede this issue. At oral argument, the Court specifically laid out the procedure it would follow with respect to the materials being transmitted to Butler, Butler then having the opportunity to present any documentary evidence of his own. The Court addressed whether there remained any need for an evidentiary hearing in the following colloquy with one of Respondent's lawyers, James Crockett:

> THE COURT: All right. Now, Mr. Crockett, let me ask you a couple of questions. Is there any reason we couldn't submit all of this in documents rather than having a hearing itself?
>
> MR. CROCKETT: That strikes me as eminently reasonable if after I've seen whatever [GM's] submission is. There is always that wild card out there, that I didn't see that one coming.

9/ Gertrude Stein, *Everybody's Autobiography* 289 (1937).

Tr. at 70. Butler now has everything he needs to contest GM's claims, and Butler has pointed out no "wild cards" which would require an evidentiary hearing. Though Respondent in his latest filings has retreated from the position taken by Mr. Crockett, his counsel's concession was well-taken and accepted. Butler has failed to inform the Court of any documentary or testimonial evidence that the Court might still need to hear or read before making its determination. Moreover, further hearings would unnecessarily cause greater expenses for both parties without eliciting anything which would aid in the determination of the issues. Any more evidence would be merely cumulative, and there has been no showing that it would benefit anyone, except for the entertainment of the participating advocates.

One more argument of Respondent's must be put to rest. Respondent has consistently objected to the allegedly "irregular" manner in which this matter has been handled, claiming that the law "disfavors" *in camera* proceedings. However the Court, in making its determinations detailed below, has relied *exclusively* upon the information that was ultimately provided to Respondent (except for particular names, billing rates, and descriptions of discounts, facts which either have been conceded by Respondent or to which Respondent has put forth no claim of need). Contrary to Respondent's assertions, the award for GM is not based on "in camera" proceedings, but solely upon the evidence presented openly to the Court and to Respondent and about which each side had more than enough opportunity to argue. Nothing more is required. *See Premex*, 655 F.2d at 782 n.2; *Morales-Feliciano*, 887 F.2d at 6-7. Respondent's motion for an further evidentiary hearings is therefore DENIED.

Chapter III: General Issues

And do as adversaries do in law,

> Strive mightily, but eat and drink as friends.[10/]

The Court will now address the issue that it was asked to determine over ten months ago. The Court first addresses in Chapter IV Respondent's most recent set of general and specific objections. The Court will then divide its awards into two parts, as contemplated by the Fourth Circuit—Chapter V covers the harm caused by Butler's misdeeds in *Moseley* and *Cockrum*, and Chapter VI covers the reasonable attorneys' fees for the contempt proceeding.

As the Court has stated previously, the decision the Court must make is different in each of these contexts. In the former, the Court need not directly address the reasonableness of the outside counsel's bills to GM. Rather, the issue in the context of the harm caused by Butler is only whether GM was reasonable in responding through its attorneys to Butler's actions in the way so claimed. Thus the Court need only look at the particular tasks, determine if they were indeed caused by Butler and a foreseeable result of his behavior, and determine if the task was a reasonable response. Given Butler's concession that the hourly rates charged were reasonable and the tasks performed, once the Court determines for which tasks (or portions thereof) GM may recover, the calculation will be relatively simple: what did GM pay for that task (or portion thereof)? In regard to this, the Court must determine if any premiums or discounts were applied to GM's bills. The Court is aware of two discounts, which the Court addresses where appropriate. Thus, other than those discounts, the amounts claimed by GM in its submission are factually accurate representations of what GM actually paid. GM will therefore be reimbursed after-the-fact, i.e., for those

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10/ William Shakespeare, *The Taming of the Shrew* act I, sc. ii (1594).

recoverable tasks for which Butler is responsible that have already been performed and billed. (Of course, in the interest of crossing every "t" and dotting every "i", the Court will address GM's claims in *Moseley* and *Cockrum* in light of the *Barber* factors as well.)

As stated above, the costs of the contempt proceeding must be approached in a different and more traditional manner. This is so because, especially as to those costs incurred by GM after the Fourth Circuit stated that GM would recover its attorneys' fees, there is a greater risk of bill inflation as the "reimbursability" is known before most of the work is performed and billed. Yet, per the Fourth Circuit order, this Court must recommend an award for attorneys' fees. The point here is that the Court will address the harm caused by Butler and the costs of these proceedings as two separate matters requiring the Court to focus on different facts and circumstances.

The Court will first address some preliminary issues before embarking upon the difficult task of determining what actions by GM attorneys were caused by Butler's misconduct. Butler has continued to attack the findings of the Fourth Circuit that GM suffered damage as a result of Butler's misconduct in *Moseley* and *Cockrum*. The "law of the case" doctrine is clear that this Court cannot and will not revisit that issue. *United States v. Bell*, 5 F.3d 64, 66 (4th Cir. 1993) (stating that the doctrine "compels compliance on remand with the dictates of a superior court and forecloses relitigation of issues expressly or impliedly decided by the appellate court"). Butler did cause harm by his behavior in *Moseley* and *Cockrum*. *See In re General Motors*, 61 F.3d at 259 ("It is clear to us that GM has suffered compensable loss."). Given this Court's interpretation of the Contempt Order, however, the Court is not simply required by the terms of that order to find that harm resulted in the *Moseley* and *Cockrum* cases

themselves. So stated, the Court is addressing the issue of exactly in what manner GM was harmed with a clean slate.

Respondent has also raised the issue of the level of proof GM must satisfy to prove its damages now that contempt has been found by the Fourth Circuit. There is a split of authority on what formulation the trial court must utilize in determining the fact and amount of particularized damages in compensatory civil contempt, once contempt itself had been found by clear and convincing evidence. The D.C. Circuit noted the split, without deciding the point, in *N.O.W. v. Operation Rescue*, 37 F.3d 646, 662 (D.C. Cir. 1994) (finding the proof satisfied either standard). The Seventh Circuit, as applied in the Federal Circuit, has required damages be proved only by a preponderance of the evidence, once the fact of contempt is proven by clear and convincing evidence. *Graves v. Kemsco Group, Inc.* 864 F.2d 754, 755 (Fed. Cir. 1988). *See also Select Creations, Inc. v. Paliafito America, Inc.*, 920 F.Supp. 1251; 1258 (E.D. Wis. 1995). *But see Nelson Tool & Machine Co. v. Wonderland Originals, Ltd.*, 491 F. Supp. 268, 269 (E.D. Pa. 1980) (applying the clear and convincing standard to proof of damages). The Court holds that the "preponderance" standard for proof of damages in this case is more appropriate and will apply that standard here. Since the Fourth Circuit has already found by clear and convincing evidence that harm has occurred, the damages issue should be treated no differently that any other run-of-the-mill civil action or fee application, of which the Court has seen scores.

Finally, GM need not prove that the actions it took in *Moseley* and *Cockrum* were *solely* caused by Butler's contumacious behavior. It is a common principle of tort law that where more than one action or party each was a contributing cause of subsequent damage, liability may be imposed on the wrongdoer if the intervening acts or final

result were foreseeable to the wrong-doer. *See Westfarm Associates Ltd. Partnership v. Washington Suburban Sanitary Comm'n*, 66 F.3d 669, 687-88 (4th Cir. 1995) (interpreting Maryland law). *See also Hill v. York County Sheriff's Dep't*, 437 S.E.2d 179, 182 (S.C. Ct. App. 1993) (defining actual cause by the "but for" test and proximate cause by "foreseeability"). Thus where it is not totally clear what one piece of information may have been the proverbial straw causing the *Moseley* court to permit depositions of GM counsel, for example, as long as this Court finds that Butler's contumacious behavior significantly contributed to the decision, and that such a result was foreseeable when Butler acted improperly, Butler may fairly be held accountable for any damage proximately caused by the Georgia tribunal's order. *See In re General Motors*, 61 F.3d at 259; *Apex Foundation Sales, Inc. v. Kleinfeld*, 27 F.3d 931, 936 (3d Cir. 1994) (utilizing under similar circumstances the phrase "sufficiently specific nexus" in reviewing the district court's findings of compensable harm caused by civil contempt).[11/]

[11/] The Court also notes that a civil compensatory sanction need not always be dependent upon proof of actual loss. *Manhattan Indus. Inc. v. Sweater Bee by Banff Ltd.*, 885 F.2d 1, 5 (2d Cir. 1989), *cert. denied*, 494 U.S. 1029, 110 S. Ct. 1477 (1990). Thus where a "harm" amount is difficult to calculate, a court is wholly justified in requiring the party in contempt to disgorge any profits it may have received that resulted in whole or in part from the contemptuous conduct. Although the Court in this matter does find that the harm "caused" is reasonably determinable, had it not found so, a finding that Butler's conduct was at least in part the cause of the settlement of the *Moseley* case, for example, might have warranted disgorgement of all or part of Butler's fees resulting from that settlement (which in this case might have amounted to millions). *See Colonial Williamsburg Foundation v. Kitzinger Co.*, 797 F.Supp. 1397, 1407 (E.D. Va. 1992), *aff'd*, 38 F.3d 134, 138 (4th Cir. 1994) (affirming district court's order disgorging defendant's profits resulting from contempt and affirming award of $361,067.01 in additioaal attorney's fees and

(continued...)

Because this is one issue that has not been squarely addressed by either party, although each had innumerable opportunities to do so, the Court will place each task related to *Moseley* and *Cockrum* into one of three categories: solely proximately caused by, contributorily caused by, or not caused by, Respondent's contempt. In some cases, this Court has reduced the hours on certain tasks claimed commensurate with what it finds would be an objectively reasonable time to necessarily expend in seeking solutions to Respondent's contumacious conduct. The amount of loss in this matter will be calculated by combining the first two categories subject to reductions for what the Court finds not to have been adequately shown to be related. Then the Court will calculate the reasonable attorneys' fees for these proceedings through January 30, 1996 and recommend awarding these to GM as well.

Chapter IV: Obstinacy and the Stalingrad Defense

> Because half a dozen grasshoppers under a fern make the field ring with their importunate chink, whilst thousands of great cattle, reposed beneath the shadow of the British oak, chew the cud and are silent, pray do not imagine that those who make the noise are the only inhabitants of the field; that, of course, they are many in number; or that, after all, they are other than the little shriveled, meager,

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[11](...continued)
costs). The Court here need not find that Butler's contempt in part caused the ultimate settlement of the *Moseley* matter. The Court merely notes that such a result would not be outside of the Court's discretion, nor without logical or precedential support.

> hopping, though loud and troublesome insects of the hour.[12/]

The Court will now outline Respondent's general objections to GM's claims as outlined in Respondent's most recent filing. Respondent's first general objection is that it would be "inappropriate for this Court to grant any award to GM without first granting Respondent access to and an opportunity to challenge the actual evidence on which that award would be based." As a result of the Court's most recent ruling, however, it is abundantly clear that the Court's award to GM is based *solely* on materials to which Respondent has had total access, and to which Respondent has been given ample opportunity to respond. Furthermore, Respondent has completely failed to put forth any arguments or point to any evidence which would require delaying this final decision so that other evidence may be put forward. This objection therefore has no basis and is overruled.

Respondent's second objection is that GM has failed to prove a "causal nexus" between Respondent's conduct and GM's claimed harms. The Court will address this objection with respect to each particular task.[13/] Respondent further objects to his opposition to the Court's reading of the Fourth

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[12/] Edmund Burke, *Reflections on the Revolution in France* (1790) (emphasis in original).

[13/] The Court will only address those objections which it determines has any arguable merit with respect to any particular task. Furthermore, many of the specific objections are redundant and have been addressed globally, prior to the discussion of any particular task. Thus the Court need not respond to every objection raised by respondent when addressing each particular task. Though the Court has made every effort to be thorough, explicitly addressing upwards of ten objections for each of the nearly 400 tasks would be ludicrous. Rather, only where reasonably made has the Court addressed any one objection.

Circuit order finding Butler in contempt. Respondent's argument notwithstanding, the Court has not read that order more broadly than necessary; it has given each line in the order its natural meaning and at the same time ascribed to the Fourth Circuit an intent not to do the unreasonable. The Fourth Circuit could not have intended to tie this Court's hands by finding certain specific reactions by GM were "caused" by Butler's misconduct. The Fourth Circuit recognized that lengthy and detailed analysis of fairly complicated facts were required before such determinations respecting causation were made, thus the Fourth Circuit referred the matter to this Court. Furthermore, the Court indeed may have been offering Respondent a "Hobson's choice" in suggesting that an evidentiary hearing at this point might be cause to allow GM to raise claims for additional harms. However this choice was certainly of Respondent's own making in taking numerous positions that the Court believes were, if not wholly baseless, at least substantially motivated simply by a desire to protract these proceedings indefinitely.

Respondent next argues that any award to GM would be inappropriate because the proceedings were brought to punish Butler and to defray GM's litigation expenses. As GM correctly notes, this objection is specious. The Court has been meticulous in guaranteeing that the amounts awarded here are no greater that the harm that was actually caused. GM's motivation in bringing this action is otherwise irrelevant. Finally, Respondent offers the following sums as reasonable in light of Butler's clear and unequivocal contempt: $500 in *Cockrum*, $200 in *Moseley*, and a proportionate sum, about $5000, for these contempt proceedings. Truly, the sheer ridiculousness of this proposal was shocking to the Court; no counsel involved here would themselves even consider undertaking any such legal proceedings for any sum

remotely near this.[14/] Respondent may have been better off not making this ridiculous recommendation.

Respondent conveniently filed his objections by number and assigned them to the particularized tasks, which he also numbered. Some objections must be addressed in the context of the particular task to which they are applied, and some may be handled generally. The Court has reviewed the documents and transcripts filed here, including those in the *Moseley* and *Cockrum* cases, in relation to Butler's objections, so as to make its own determinations of what it finds were necessary and reasonable in the context of responding to the contumacious conduct.

Objection 1: Respondent objects to any task that has been withdrawn by General Motors on the basis of this Court's most recent order. This is an odd objection indeed, but not surprising in a Stalingrad defense. Respondent further argues that his inability to actually view the information that was identified by the Court as potentially or remotely having potential to give Butler an opportunity to attack the particular task, such as information which might have led one to believe that that task involved work only partly relating directly to Butler's contempt, and which GM withdrew, undermines the legitimacy and validity of *all* of GM's claims. On the contrary, however, these particular tasks were identified by the Court as having any *remote* possibility of assailability. The Court never passed on whether in fact these tasks were or were not recoverable. Furthermore, the information identified by the Court was particular only to the task addressed, and did not affect any other tasks or claims GM made. For example,

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[14/] It is noted that the attorneys involved in this case would probably charge more than that to determine only whether or not they would represent either party in this proceeding.

in many cases, the task description in the *in camera* submission listed certain legal issues which were researched, but the description provided to Respondent only stated that legal issues, in general, were researched. The Court felt that in such cases, it would have been appropriate for GM to include what issues were researched. *See, e.g.*, items 10, 12, 38, 40, 66, 69, 70, 218, 220, 222. GM's withdrawal of the claim was stated to be no more than a willingness to see the end of this matter, and to protect GM's legal defense strategy, since the underlying litigation is ongoing. Clearly this had no effect on the validity of any other claim by GM. This objection is therefore overruled and rejected.

Objection 2: Respondent objects to any task in *Moseley* after GM's counsel wrote his letter to that court immediately following Butler's contumacious letter. Butler again has misstated the Court's task: the Court will determine whether the task claimed bears any relationship to Butler's misconduct, whether such a response was foreseeable by Butler, and whether such response by GM was reasonable under the totality of the circumstances. As a general matter, the Court has found that Butler's letter caused more than merely a single letter in response. On the more specific level, this causation argument will be determined on a task-by-task basis.

Objection 3: Respondent objects to any work performed by GM counsel subsequent to and in response to the *Moseley* court order of October 4 which ordered depositions of GM counsel. On this issue Respondent is correct in noting that his misconduct was not the sole proximate cause of the Judge Thompson's order. However, the Court is convinced that Respondent's contumacious letter played no small part in the process that led up to Judge Thompson's decision. As stated before, the contempt need not have been the sole proximate cause of the tribunal's action, but rather only a significant contributing cause. *See Apex Foundation Sales*, 27 F.3d at

936.

Butler has previously claimed that his letter to Judge Thompson is legally irrelevant to the judge's decision because a judge is "presumably competent to screen out and disregard what he thinks he should not have heard, or to discount it for practical and sensible reasons." *Multi-Media Convalescent & Nursing Ctr. v. N.L.R.B.*, 550 F.2d 974, 977 (4th Cir.), *cert. denied*, 434 U.S. 835, 98 S. Ct. 124 (1977). However, when a federal district judge makes numerous statements as strong and definitive as those which were stricken, regardless of whether the reader knows it has been subsequently stricken by a higher court, such comments cannot easily be put out of one's mind. This was the clear purpose of the Fourth Circuit unequivocal command that the stricken lines from Judge Anderson's recusal order "not be cited as authority." March 23rd Order, at 2-3. Further, the Court notes that one of the dangers of letter requests (such as Butler's contumacious letter) is that the suspicion inevitably arises that matters outside of the case and motion filings may arguably affect the tribunal's actions. Judge Thompson appeared to state as much. GM's Reply of May 17, 1996, at 7 (quoting Judge Thompson at the 2/1/95 hearing, where he stated that the request for attorney depositions should have come before the Court "in another fashion"). The Court finds that Butler's letter of August 30 in which he specifically quoted Judge Anderson's findings, which were subsequently stricken by the Fourth Circuit, was a contributing cause of Judge Thompson's order of October 4 to depose GM counsel. Further, the Court finds that the order was foreseeable to Butler when he drafted and delivered that letter to Judge Thompson. Therefore any reasonable and foreseeable response to that order is also recoverable. Butler's objection is therefore overruled.

Objection 4: Respondent argues that the depositions ordered by Judge Thompson on October 4 never occurred, and

therefore GM cannot recover for actions in response to that order. The Court finds, however, that Butler wrote the contumacious letter intending to cause an order such as the one issued on October 4th. The Court finds credible GM's assertions that GM needed to respond forcefully and quickly to that order, in part because of its immense national implications. Furthermore the motions for protective orders, motions for vacation, and drafting a writ of mandamus, were certainly foreseeable to, if not directly intended by, Butler. In this respect, then, Butler's objection is overruled.

Respondent also notes here that the particular task description identified does not specify to which part of the October 4th order GM counsel's actions were addressing. The Court is aware that Judge Thompson's order concerned numerous issues with respect to the remand by the Georgia Court of Appeals and the new trial, some of which had no relation to Butler's contempt. The Court will therefore address this particular objection in reference to each task where appropriately raised.

Objection 5: Respondent argues that work in relation to preparation of a writ of mandamus to prevent attorney depositions was not related to Butler's misconduct. Again, the Court finds that GM has satisfied its burden in showing that these actions, despite the fact that the motion for the writ was never filed, were foreseeable to Butler and were a reasonable response when other attempts had been yet to be acted upon by Judge Thompson. Respondent's objection is overruled and rejected.

Objection 6: Respondent argues that the work performed in these tasks were not the result of Butler's contempt in *Cockrum*. First, as GM correctly notes, Butler only raises this objection with respect to work performed by attorneys for Kirkland & Ellis on this matter and not for work performed

by Shaw, Pittman on the same brief. The Court warned Respondent that arguments not raised in his most recent filing may be waived. However, because this objection has been maintained throughout these proceedings and is so vital to Respondent's defense with respect to *Cockrum*, the Court will not penalize Respondent for this apparent oversight. (Regardless, a similar if not identical objection has been raised in Respondent's objection 7.)

The Court first finds that the reply brief itself was not caused by the misconduct in *Cockrum* cited by the Fourth Circuit. However, the Court finds that, at the very least a certain portion of that brief responded directly to Butler's misconduct in *Cockrum*. As for the remaining portions, the Court finds that most of the rest of the brief was not a foreseeable result of the misconduct found by the Fourth Circuit and was not even in part caused by Butler's misconduct. The Court will therefore tailor its findings accordingly.

Objection 7: Again Butler objects to GM's claims in relation to the reply brief in *Cockrum* on the grounds that the court was already aware of the Fourth Circuit's order. Insofar as this objection raises the issue that the contempt was not of Respondent's doing but of another lawyer's, such is overruled, as having been rejected by the Fourth Circuit. *See In re General Motors*, 61 F.3d at 257 n.1. Insofar as it appropriately maintains that GM could not have been harmed by Butler's response, this objection is identical to that raised in Objection 6, and the Court's findings above related to that objection apply equally here.

Objection 8: Butler argues, based on the particular task description, that these tasks were not caused by his misconduct but rather relate to "general defense efforts or litigation strategy in the underlying litigation." As the Court

stated above, the Court will address each claim of GM, where necessary, in the context of the reasonableness of the action, its foreseeability to Butler, and the nexus to Butler's misconduct.

Objection 9: Respondent again raises the "nexus" argument, here stating that the description is vague or overbroad, thus claiming that the Court cannot guarantee that the entirety of the work related to Butler's contempt. This argument will be addressed to each particular task where necessary.

Objection 10: Respondent objects claiming that more information must be provided by GM to support the claim. Again, where made reasonably, the Court will address this objection. As far as Respondent's argument (raised now for the first time) that Respondent cannot be sure that certain attorneys are not (presumably inadvertently) double-billing, the Court has scrutinized the hours and attorneys to make certain that no single attorney has claimed work on the same day for different tasks which would give rise to such an implication. With respect to *Moseley* and *Cockrum*, given the immensity of the issue, the Court again notes that the mere fact that numerous attorneys worked on the same task at the same time does not raise any suspicion. The key for the determination (once foreseeability and causation have been determined) in those contexts is whether under the facts and circumstances involved this was reasonable.

Objection 11: Respondent objects here, stating that the claim cannot be reasonably understood or assessed without further explanation or description. This is identical to the objections in 9 and 10, and therefore the same applies here as above.

Objection 12: Respondent argues that these tasks are too

long after the offending conduct to have been caused by that conduct. This is essentially a restatement of the proximate cause argument. Again this will be addressed where necessary.

Objection 13: Respondent argues that the fees requested for the contempt proceeding are grossly disproportionate to the harm caused by Butler. The Court has already rejected this argument by finding that the harm found by the Fourth Circuit was not limited to reactions by GM counsel in *Moseley* and *Cockrum*. Furthermore, even if it were so limited, the damages in these cases resulting from Butler's misconduct were significant. Finally, much of the fees requested by GM for the contempt proceeding relate to responses to filings by Butler and arguments raised by Butler which were unreasonable (e.g., the argument that Butler was not the wrong-doer in *Cockrum*, the argument that GM was never harmed despite the Fourth Circuit's clear statement to the contrary, and the motion in this Court for production of settlement documents). While not faulting Butler for demanding the process to which he might otherwise be due in such a proceeding, the Court notes that a large portion of those tasks claimed by GM would never have been undertaken had Butler taken more reasonable and justifiable positions in this Court. It is never surprising that where an attorney is the client and attends sessions, the client participates more than an ordinary client and the proceedings necessarily become more contentious.

The Fourth Circuit decision in *Sun Publishing Co., Inc. v. Mecklenburg News, Inc.*, 823 F.2d 818 (4th Cir. 1987), cited by Butler for the proposition that exorbitant fee requests out of proportion to the underlying harm should be denied *in toto*, actually supports this Court's decision in the present matter. In *Sun Publishing*, the underlying harm was approximately $85,000. *Id.* at 819. The trial court had

already awarded approximately $300,000 in fees, and then denied a second supplemental application for fees without addressing *Barber*, based on the fact that the second request shocked the conscience of the court. The Fourth Circuit reviewed and affirmed this decision, noting that "as many as six lawyers from three different firms billed significant amounts of time in preparing for the short hearing on a simple issue." *Id.* at 820. Thus the Fourth Circuit examined the reasonableness of the request based on the totality of the circumstances, and relied on the simplicity of the issue primarily in determining that the second fee request was disproportionate. Here the underlying harm was highly significant; the matter was far from a "short hearing," based in large measure to Respondent's tactical choices, and thus was not a single "simple issue"; and Respondent himself has hired numerous law firms to aid in his defense. The numerous issues in this case therefore warrant greater time and attention by attorneys than did the issue in *Sun Publishing*. Moreover, the Fourth Circuit did not take issue with the initial fee award of approximately $300,000.00 when the harm was significantly less than this amount. This objection is therefore overruled.

Objection 14: Respondent here objects to tasks performed by GM counsel raising issues rejected by the Fourth Circuit or not addressed by that Court, such as the request to institute disciplinary proceedings against Respondent, etc. The Court will address those particular tasks objected to by Respondent on this ground where necessary (i.e., where it appears that such was an unreasonable or unnecessary request or demand by GM).

Objection 15: Respondent argues that these tasks should not be recoverable because it is unreasonable to penalize Respondent for GM's "failure to make its case or prove its damages in a timely, efficient, forthcoming, or persuasive

manner." However, the Court finds that at all times before this Court GM's position has been reasonable and supported by a reasonable basis both in law and in fact (e.g., GM's position on work product protection and an evidentiary hearing). As noted above, the same cannot be said of all of Respondent's positions. Because these issues were complex and required some limited judicial innovation, the Court will not fault GM for making claims for work on positions that were ultimately rejected by this Court or the Fourth Circuit. This objection is therefore overruled.

Objection 16: Respondent argues that these particular tasks in relation to the contempt proceeding occurred prior to the initiation of the contempt proceeding in the Fourth Circuit, and therefore are presumptively unreasonable. To this extent, where there existed any possibility that these needed further explanation, the Court requested such. GM withdrew these claims. GM argues that the remaining tasks (only three, for a total of 3.1 hours of associates' time) were performed by GM counsel when Respondent exhibited behavior which GM counsel thought might be contempt of the Fourth Circuit's March 23rd Order. These tasks mostly included research into the viability of this contempt proceeding, and conferences regarding the same. So stated, GM's position is justified. *See Webb v. Board of Education of Dyer County, Tenn.*, 471 U.S. 234, 243, 105 S. Ct. 1923, 1928 (1985) (work "on the litigation" includes time spent drafting the initial pleadings and the work associated with the development of the theory of the case). Based upon the factual account given by GM in its Response filed April 12, 1996, and not contradicted by Respondent, these tasks were preliminary research performed when Butler courted contempt prior to the *Moseley* letter. Surely research performed prior to a case being filed is recoverable as part of the attorney's fees for that case. *See id.* In fact, Rule 11 of the Federal Rules of Civil Procedure requires reasonable inquiry into the law and facts of a case

prior to ever filing the initial pleading. The tasks performed by GM counsel prior to the institution of the contempt proceeding which were not withdrawn were clearly related to this proceeding. Since this research was clearly utilized in this proceeding and the fees were billed and paid for by General Motors in this proceeding, these tasks, comprising 3.1 hours of work, are recoverable. This objection is therefore overruled.

Objection 17: Respondent objects to work performed by legal assistants/paralegals, insofar as such work is overhead and therefore allegedly taken into account in the billing rates of the lawyers in the law firms. Respondent has cited no authority for this proposition. GM has not claimed for tasks performed by the secretaries of those lawyers working on this matter (or for that matter for those services provided by other in-house groups), although it is highly likely that such staff spent considerable time on these matters. Those costs are generally included as "overhead." On the contrary, here GM has only claimed for tasks performed by paralegals which would have normally been, and in fact were, separately billed and paid for by GM. Thus recovery of these amounts is appropriate. *See Missouri v. Jenkins*, 491 U.S. 274, 289, 109 S. Ct. 2463, 2472 (1989) (identifying and condoning awards for paralegals and law clerks where separately-billed). This objection is therefore overruled.

Chapter V: The Butler Did It

> To every action there is always opposed an equal reaction: or, the mutual actions of two bodies upon each other are always equal, and directed to contrary

parts.[15/]

The Court will now address each specific task claimed by GM and the objections to recovery for each task raised by Respondent. Where the Court does not expressly address a particular objection, it should be presumed that it either has already been addressed above or the Court does not feel that the objection warrants any further attention. In awarding or not awarding any particular task, the Court has further utilized the relevant factors in *Barber v. Kimbrell's Inc.*: the time and labor expended, the novelty and difficulty of the questions raised, the skill required to properly perform the legal serviced rendered, the customary fee for like work, the amount in controversy and the results obtained, the experience reputation and ability of the attorneys, and attorneys' fees awards in similar cases. 577 F.2d at 226 n.28. For the convenience of the parties, the Court will utilize the numbering scheme adopted by Respondent in Appendix B of his most recent filing. As stated above, the Court will note whether Butler's misconduct was the sole proximate cause ("sole") or the contributing cause ("contrib.") of the task. Otherwise, the Court will not recommend GM recover ("denied") where GM has failed to satisfy its burden, or note that the claim for the particular item has been withdrawn ("WITHDRAWN").

[15/] Sir Isaac Newton, *Mathematical Principles of Natural Philosophy* 13 (A. Motte trans., 1934) (1686) (Newton's Third Law of Motion). Thus in battle, force must be met with equal opposing force, and adversaries in combat continuously try to gain advantage over the other by increasing the force or the manner of application. What was or was not reasonable action by GM must be viewed in that context.

MOSELEY v. GENERAL MOTORS

A. Respond to Butler's letter to Judge Thompson, *Kirkland & Ellis*

The Court finds that the tasks listed under this general heading were entirely in response to the contumacious letter authored by Respondent.

Item	Title	Hours	Rate $/Hr	Description	Hrs. Awarded	Sole or Contrib.	Ttl $
1	Assc.[16]	0.5	195	Draft letters in response to Butler letters in CK cases	0.5	sole	97.50
2	Assc.	1.0	195	Draft letters in response to Butler letters in CK cases	1.0	sole	195.00
Total							292.50

B. Respond to Butler's Letter to Judge Thompson, *King & Spalding*

(See "A." above.)

Item	Title	Hours	Rate $/Hr	Description	Hrs. Awarded	Sole or Contrib.	Ttl $
42	WITHDRAWN						0.00
43	Part.	0.4	225	Conference; telephone conference with counsel.	0.4	sole	90.00
44	WITHDRAWN						0.00

[16] "Assc." is an abbreviation of associate; "Part." is used for partner; "Leg.A." used for paralegal or legal assistant; "Couns." used for Of Counsel.

45	WITHDRAWN						0.00
46	Part.	2.5	225	Study of Mr. Butler's letter of August 30 to Judge Thompson; conference with counsel re same; draft letters to Butler & Thompson; telephone conferences with counsel.	2.5	sole	562.50
47	Part.	0.7	205	Revise letter to Judge Thompson.	0.7	sole	143.50
48	Part.	1.0	225	Conference with client, counsel; letter to Judge Thompson.	1.0	sole	225.00
49	Part.	0.2	225	Review Mr. Butler's letter to Judge Thompson; telephone conference re letter.	0.2	sole	45.00
50	Part.	0.3	205	Review letter to Judge Thompson; counsel with conference re same.	0.3	sole	61.50
51	Part.	0.6	205	Review Motion to Show Cause and Mr. Butler's letter to Judge Thompson.	0.6	sole	123.00
52	Part.	0.3	235	Review Mr. Butler's letter to Judge Thompson.	0.3	sole	70.50
53	WITHDRAWN						0.00
Total							1,321.00

C. Initial Response to and Analysis of October 4 Order,[17] *Kirkland & Ellis*

The Court has found that Butler's letter materially affected the *Moseley* court's decision to allow the depositions of GM counsel. However, the Court notes that the description of work does not show that the work was solely limited to the deposition issue. Clearly the letter permeated the problem. Therefore the Court finds that Butler's letter contributed to and is responsible for a significant portion of each of the tasks claimed by General Motors and recommends awarding an appropriate portion related to what it finds was necessary and reasonable.

Item	Title	Hours	Rate $/Hr	Description	Hrs. Awarded	Sole or Contrib.	Ttl $
3	Part.	2.75	285	Client meetings re 10/3 order.	1.4	contrib.	399.00
4	Part.	3.0	285	Client and office meetings re 10/3 order.	1.5	contrib.	427.50
5	Part.	2.0	260	Review and analysis of October 3 order.	1.0	contrib.	260.00
6	WITHDRAWN						0.00
7	Part.	5.25	285	Client, office conferences re 10/3 order; work during return travel.	2.6	contrib.	741.00
8	WITHDRAWN						0.00

[17] In some places this order is referred to as the "October 3rd" order, and elsewhere it is referred to as the "October 4th" order. The order at issue in the case appears to have been filed on October 4th. Since Butler has not raised any objection or concern related to this apparent discrepancy, the Court assumes that the order was delivered to counsel on the third of October and filed on the fourth. The Court will discuss the order as if it was filed on the fourth.

9	WITHDRAWN	0.00
Total		1,827.50

D. Initial Response to and Analysis of October 4 Order, *King & Spalding*

(See "C." above.)

Item	Title	Hours	Rate $/Hr	Description	Hrs. Awarded	Sole or Contrib.	Ttl $
54	WITHDRAWN						0.00
55	Part.	1.1	205	Conference call with counsel and client re Court Order; pull materials together re same.	0.5	contrib.	102.50
Total							102.50

E. Motion for Reconsideration and Vacation of October 4 Order, *Kirkland & Ellis*

As stated above, the Court finds that, although there was other evidence and information before Judge Thompson regarding attorney depositions, Butler's contumacious letter, as well as his suggestion at the September 8 hearing, were each causes of the order allowing depositions of GM counsel. Thus the letter itself contributed to GM's immediate responses to the October 4 order, and the Court further finds that this order was a foreseeable result of Butler's actions. However, the entirety of that motion to reconsider was not related to Butler's misconduct, or even more generally related entirely to attorney depositions. Therefore the Court has only recommended GM receive a portion of its hours for each task under this heading as it finds reasonable and necessary.

Item	Title	Hours	Rate $/Hr	Description	Hrs. Awarded	Sole or Contrib.	Ttl $
10	WITHDRAWN						0.00
11	Part.	2.5	260	Preparation of motion papers; conferences re same.	1.0	contrib.	260.00
12	WITHDRAWN						0.00
13	Assc.	2.5	195	Outline and research motion for reconsideration.	1.0	contrib.	195.00
14	Part.	2.0	260	Work on motion papers; conference with counsel.	0.8	contrib.	208.00
15	Part.	1.25	240	Review and edit petition for reconsideration.	0.5	contrib.	120.00
16	Part.	1.0	240	Telephone conferences with counsel.	0.4	contrib.	96.00
17	Assc.	6.0	195	Work on motion for reconsideration and vacation.	2.4	contrib.	468.00
18	Part.	3.0	260	Work on edits, revisions to motion to reconsider October 4 order, various conferences re same and related issues.	1.2	contrib.	312.00
19	Assc.	13.5	140	Read and edit draft of Moseley motion to reconsider; telephone conference re same with counsel.	5.4	contrib.	756.00
20	Assc.	4.0	175	Draft section of motion for reconsideration; edit and revise motion for reconsideration.	1.6	contrib.	280.00
21	Assc.	8.0	195	Draft and edit moseley motion for reconsideration and vacation.	3.2	contrib.	624.00
22	Part.	2.5	260	Work on motion papers.	1.0	contrib.	260.00

23	Assc.	1.0	175	Review final motion for reconsideration; motion for protective orders.	0.4	contrib.	70.00
Total							3,649.00

F. Motion for Reconsideration and Vacation of October 4 Order, King & Spalding

(See "E." above.)

Item	Title	Hours	Rate $/Hr	Description	Hrs. Awarded	Sole or Contrib.	Ttl $
56	Part.	0.6	350	Telephone conference with counsel; conference call with client re Motion for Reconsideration and other pleadings; interoffice calls; review of correspondence.	0.2	contrib.	70.00
57	WITHDRAWN						0.00
58	Assc.	1.1	145	Review and revise Motion for Reconsideration and Protective Order briefs; conference with counsel and client.	0.4	contrib.	58.00
Total							128.00

G. Motions for Protective Order to Prevent Attorney Depositions, Kirkland & Ellis

Since the Court has found that Butler's letter was a significant contributing cause to the entry of the October 4th order, the Court also finds that GM's responses beyond the initial motion for reconsideration, which was not immediately successful, were foreseeable to Butler and therefore are also recoverable under the circumstances surrounding the case.

Since attorney depositions were a major part of this response, the Court has tailored its recommendation to that which it finds below as reasonable and necessary. Item 32 has been denied by the Court as GM has failed to submit a copy of the appropriate bill containing that particular task.

Item	Title	Hours	Rate $/Hr	Description	Hrs. Awarded	Sole or Contrib.	Ttl $
24	Assc.	8.0	140	Prepare oral arguments on protective orders; edit and proof brief; research legal issues re depositions.	5.6	contrib.	748.00
25	Assc.	0.5	140	Prepare oral arguments on protective orders; edit and proof brief.	0.4	contrib.	56.00
26	WITHDRAWN						0.00
27	Assc.	6.25	175	Work on researching, drafting and editing brief in support of a motion for a protective order preventing the depositions of attorneys.	4.4	contrib.	770.00
28	WITHDRAWN						0.00
29	Assc.	8.5	175	Work on various pleadings, including research, draft and edit brief in support of a motion for a protective order preventing the depositions of attorneys. Finalize brief and motion for filing.	6.0	contrib.	1050.00
30	Part.	6.0	260	Work on motions to quash lawyer depositions; various conferences re same.	4.2	contrib.	1092.00

31	Assc.	2.5	195	Read and respond to letters from Butler re attorney depositions. Outline mandamus.	1.8	contrib.	351.00
32	Leg.A.	4.0	90	Proof, edit, cite-check brief.	2.8	denied	0.00
Total							4,103.00

H. Motions for Protective Order to Prevent Attorney Depositions, King & Spalding

(See "G." above.)

Item	Title	Hours	Rate $/Hr	Description	Hrs. Awarded	Sole or Contrib.	Ttl $
59	Assc.	8.2	145	Prepare motions for protective order.	5.7	contrib.	826.50
60	Part.	0.4	205	Conference with counsel re protective order motions.	0.3	contrib.	61.50
61	Assc.	8.9	145	Prepare briefs in support of motion for protective order.	6.2	contrib.	899.00
62	Part.	3.9	205	Review briefs in support of Motions for Protective Orders; conference with counsel re same; review materials re same.	2.7	contrib.	553.50
63	Part.	9.8	205	Revise Motions and Briefs in Support of Protective Orders.	6.9	contrib.	1414.50
64	Assc.	3.3	145	Prepare briefs in support of motions for order; assist with Motion for Reconsideration.	2.3	contrib.	333.50
65	Part.	1.1	225	Conference re lawyer depositions in Moseley.	0.8	contrib.	180.00

66	WITHDRAWN						0.00
67	Assc.	3.5	145	Revise Motion for protective order; prepare petition for writ of mandamus.	2.4	contrib.	348.00
68	Part.	4.4	205	Revise Motion and Brief in Support of Protective Order for lawyer depositions.	3.1	contrib.	635.50
69	WITHDRAWN						0.00
70	WITHDRAWN						0.00
Total							5,252.00

I. October 13 Hearing Before Judge Thompson, Kirkland & Ellis

The Court has reviewed the transcript of the October 13 hearing and notes that much of that hearing was spent on discovery issues not related to Judge Thompson's suggestion that GM counsel be deposed. The Court finds that the hearing itself would not have taken place without the contumacious conduct, and the hearing was foreseeable after the October 4th order was entered; however it finds that only a small fraction of the hearing was spent on issues related to Respondent's contumacious conduct, and therefore tailors the recommendation to what it finds below as reasonable and necessary.

Item	Title	Hours	Rate $/Hr	Description	Hrs. Awarded	Sole or Contrib.	Ttl $
33	Part.	1.5	285	Conferences re hearing.	0.2	contrib.	57.00
34	Part.	2.0	260	Conference with counsel re hearing. Confer with client.	0.3	contrib.	78.00
35	WITHDRAWN						0.00

36	Part.	4.25	260	Prepare for court hearing; attend hearing; conference after hearing; plan mandamus.	0.6	contrib.	156.00
Total							291.00

J. October 13 Hearing Before Judge Thompson, King & Spalding

(See "I." above.)

Item	Title	Hours	Rate $/Hr	Description	Hrs. Awarded	Sole or Contrib.	Tl $
71	Part.	1.5	235	Review and revise motions; review and revise Motion for Protective Order; prepare argument on Motion for Reconsideration/Vacation of October 4 Order.	0.2	contrib.	47.00
72	Part.	4.0	350	Review draft of memorandum of law in support of General Motors' Motion for Protective Order; hearing before Judge Thompson.	0.5	contrib.	175.00
73	Part.	3.7	205	Hearing on General Motors' Motion to Reconsider and for Protective Order; various conferences re same; post-hearing meeting.	0.5	contrib.	102.50
74	Part.	0.8	350	Review Mr. Butler's post-hearing letter to Judge Thompson and response; review Mr. Butler's letter to Judge Thompson; conference with counsel re same.	0.1	contrib.	35.00
Total							359.50

K. Prepare for Possible Writ of Mandamus, Kirkland & Ellis

The Court finds that such an effort on behalf of GM by its attorneys was both reasonable and foreseeable to Butler under the circumstances, once its other efforts were not immediately successful. On the other hand, the Court has reduced the number of hours on these tasks to estimate a more appropriate total amount of time to work on this document, which was not filed in the Georgia court. Thus, what is recommended below is what it finds was reasonable and necessary.

Item	Title	Hours	Rate $/Hr	Description	Hrs. Awarded	Sole or Contrib.	Ttl $
37	Assc.	5.0	140	Research and edit motion re video depositions; draft outline of petition for writ of mandamus.	3.5	contrib.	490.00
38	WITHDRAWN						0.00
39	Part.	0.5	375	Analysis of mandamus strategy; telephone call to counsel.	0.4	contrib.	150.00
40	WITHDRAWN						0.00
41	Part.	1.5	375	Analysis of mandamus strategy; meeting; review and edit of draft.	1.0	contrib.	375.00
Total							1,015.00

L. Prepare for Possible Writ of Mandamus, King & Spalding

(See "K." above.)

Item	Title	Hours	Rate $/Hr	Description	Hrs. Awarded	Sole or Contrib.	Ttl $

75	Part.	1.2	350	Review memorandum from counsel re depositions and mandamus.	0.8	contrib.	280.00
76	Assc.	1.7	145	Gather materials for mandamus proceeding and motions for protective order.	1.2	contrib.	174.00
77	Part.	0.7	205	Review mandamus papers.	0.5	contrib.	102.50
Total							556.50

COCKRUM v. GENERAL MOTORS

M. Drafting Reply Brief re: Attorney Depositions, Kirkland & Ellis

A significant portion of this brief related to responding to Butler's claims regarding the Fourth Circuit's order. Thus the Court has found that Butler's conduct contributed to the cause of each of these items, and that these responses were foreseeable to Butler at the time he filed his brief. However, the Court has reduced the time for each of the tasks to approximate as closely as possible the true amount of time GM counsel were addressing Butler's misconduct directly, given that the court had already been made aware of the Fourth Circuit's March 23rd Order. The finding below is what the Court finds was reasonable and necessary.

Item	Title	Hours	Rate $/Hr	Description	Hrs. Awarded	Sole or Contrib.	Ttl $
78	Part.	0.5	260	Review filings and address reply issue re lawyer deposition.	0.1	contrib.	26.00
79	Part.	7.5	240	Draft Reply Brief re attorney depositions.	1.0	contrib.	240.00

80	Part.	3.0	240	Edit Reply Brief re attorneys.	0.4	contrib.	96.00
81	Part.	7.5	240	Redrafting Reply Brief re attorney depositions.	1.0	contrib.	240.00
82	Part.	7.0	240	Redrafting Reply Brief re attorney depositions.	0.9	contrib.	216.00
83	Part.	5.5	240	Editing Reply Brief re , affidavits.	0.7	contrib.	168.00
84	Part.	4.0	240	Edit Reply Brief re attorney depositions.	0.5	contrib.	120.00
85	Part.	0.25	240	Review draft of Reply Brief re lawyer depositions.	0.1	contrib.	24.00
86	Part.	7.5	240	Meetings with counsel and client and review Reply Brief re attorney depositions.	1.0	contrib.	240.00
87	Assc.	4.0	175	Edit Reply Brief on attorney depositions.	0.5	contrib.	87.50
88	Assc.	2.0	175	Review Plaintiffs' brief opposing General Motors' Motion for Protective Order.	0.3	contrib.	52.50
Total							1,510.00

N. Drafting Reply Brief re: Attorney Depositions, Shaw, Pittman, Potts & Trowbridge

(See "M." above.)

Item	Title	Hours	Rate $/Hr	Description	Hrs. Awarded	Sole or Contrib.	Ttl $
89	Part.	10.5	225	Response to plaintiff in Cockrum.	1.4	contrib.	315.00
90	Part.	12.0	225	Response to plaintiff in Cockrum.	1.6	contrib.	360.00

91	Assc.	5.0	185	Preparation of portion of reply brief re protective order.	0.7	contrib.	129.50
92	Part.	11.5	225	Response to plaintiff in Cockrum.	1.5	contrib.	337.50
93	Part.	5.0	225	Response to plaintiff in Cockrum.	0.6	contrib.	135.00
94	Part.	11.0	225	Response to plaintiff in Cockrum.	1.4	contrib.	315.00
95	Part.	6.0	225	Revise reply memorandum; teleconferences with counsel and client.	0.8	contrib.	180.00
96	Part.	11.8	225	Response to plaintiff in Cockrum.	1.5	contrib.	337.50
97	Part.	5.0	225	Revise reply brief; teleconference with counsel and client.	0.6	contrib.	135.00
98	Couns.	4.5	350	Review/revise reply memo; teleconference with counsel.	0.6	contrib.	210.00
99	WITHDRAWN						0.00
100	Part.	8.3	225	Reviewing material; comments on draft; memo to file.	1.1	contrib.	247.50
101	Couns.	1.3	350	Teleconferences with counsel and client; review draft reply.	0.2	contrib.	70.00
102	Couns.	5.2	350	Review reply draft; teleconferences with counsel re same.	0.7	contrib.	245.00
103	WITHDRAWN						0.00
104	Couns.	9.3	350	Teleconferences re reply draft; revise reply brief.	1.2	contrib.	420.00
105	WITHDRAWN						0.00

106	Couns.	12.0	350	Travel (work on plane) and meeting with counsel re reply brief; revise reply brief; review factual materials.	1.6	contrib.	560.00
107	Couns.	9.0	350	Travel (work on plane) and meeting with counsel re reply brief; revise reply brief; review factual materials.	1.2	contrib.	420.00
108	Couns.	1.3	350	Teleconferences with client and counsel re reply brief filing; conferences with counsel.	0.2	contrib.	70.00
Total							4,487.00

In sum, the Court finds that Respondent is solely responsible for damages in the amount of $1613.50 and contributorily responsible for damages in the amount of $17,284.00 in *Moseley*, and contributorily responsible for damages in the amount of $5997.00 in *Cockrum*. The Court therefore finds that GM's "expenses germinating from Butler's misconduct in the Georgia state court and the United States District Court for the District of Kansas" come to a total of $24,894.50. These amounts are also appropriate in light of the *Barber* factors, given that the issue was extremely important to the client, the quality of representation was exceptional, the underlying issues were complex, and the number of hours and rates were reasonable under these conditions.

Chapter VI: The Butler Pays For It

Recompense injury with justice,

recompense kindness with kindness.[18/]

As the Court stated previously, the determination of costs with respect to the contempt proceeding itself is substantially different from the determination of actual harm caused by Butler's misconduct. For one, the Fourth Circuit has actually required this court to award GM attorneys' fees for the contempt proceeding, whereas the Fourth Circuit did not specify exactly what other harm was caused by Butler's misconduct in *Moseley* and *Cockrum*. *In re General Motors*, 61 F.3d at 259 (stating that "GM is entitled to reasonable costs and attorney's fees for the contempt proceeding before this court."). There is absolutely no evidence whatsoever that GM suspected it might recover its attorney's fees for responding to GM's contempt in *Moseley* and *Cockrum*. There the payment of the bills without any expectation of reimbursement is itself evidence of its reasonableness, since the question is whether the expenditure by General Motors was a reasonable one in the eyes of General Motors or a reasonable corporation in the same position as GM. On the other hand, this contempt proceeding was initiated for a different purpose. Thus the recovery of the costs of these proceeding may have been, if not intended, at least suspected by GM as a possible remedy. The Court must therefore adopt a more rigid test for GM's claims for attorneys' fees resulting from this proceeding. With respect to *Moseley* and *Cockrum*, the *Barber* factors were an analogy; here they control.

In awarding attorneys' fees (as opposed to "harm" which took form as attorneys' fees), the district court should first focus on the time and labor expended and the customary fees for like work. *Colonial Williamsburg Foundation v. Kittinger Co.*, 38 F.3d 133, 138 (4th Cir. 1994) (citing *Barber v.*

[18/] Confucius, *The Confucian Analects*, bk. 14:36, iii.

Kimbrell's Inc., 577 F.2d at 226 n.28). "After determining the initial fee, the district court should consider whether to adjust the fee on the basis of other factors, briefly explaining any adjustment." *Colonial Williamsburg*, 38 F.3d at 138.

The Court finds that the rates charged by GM counsel were reasonable for the type of work performed and the relative novelty of the issues addressed in this proceeding (as well as the manner in which they were addressed). Butler conceded this at oral argument. Nor has he submitted the rates of his own counsel for comparison by the Court. Finally, none of the rates charged by GM counsel, given the individual attorneys, firms, and cities involved, strike the Court as out-of-the-ordinary.

Butler has argued that the total number of hours spent by GM counsel on this proceeding were unreasonable in relation to the amount of harm caused by Butler's misconduct. However, the Court has already shown that this is not a major concern, given the Court's interpretation of the Fourth Circuit order and *Sun Publishing Co.*, where harm was calculated to be approximately $85,000.00, yet approximately $300,000.00 in fees were awarded. 823 F.2d at 819. *See also Colonial Williamsburg*, 792 F.Supp. at 1408 (ordering approximately $194,000.00 profits disgorged), 38 F.3d at 138 (affirming district court's finding of civil compensatory contempt and award of over $360,000.00 in attorneys' fees and costs). Even if the amounts were required to be proportionate, GM has only requested recovery of a portion of what the Fourth Circuit deemed recoverable; had GM requested compensation for all of expenses "germinating" from Butler's misconduct "in other jurisdictions" outside of the Georgia state court and Kansas federal district court, the difference between the "harm" claimed and the attorneys' fees requested would potentially have been negligible. It must be restated here that GM requested only its attorneys' fees in both *Moseley* and

Cockrum and in the contempt proceeding, not travel, photocopying, telephone or other expenses which would certainly have been considerable and attributable to Butler's misconduct. Thus given the complexity of this matter, the number of counsel retained by Respondent, the number of complex (as well as questionable) issues raised repeatedly by Respondent, and the lengthy process it has taken for this Court to finally reach its decision, the total number of hours spent by GM counsel on this matter are clearly not excessive. Again, Respondent has failed to identify the total number of hours *his* counsel have spent in this matter. Since this is such an unusual matter, this failure can only be seen, despite Respondent's protestations, as a concession that GM's counsel's total efforts actually were reasonable.

As to the rest of the factors in *Barber v. Kimbrell's*, 577 F.2d at 226 n.28, the Court notes that Respondent has made few specific objections based on this list. However the Court will address these factors as well. The questions in this proceeding, such as the need for an evidentiary hearing privilege, work product and waiver issues, were both novel and difficult. Counsel for GM, though numerous, were not unreasonably so, especially in light of Respondent's retention of an equal number of counsel of similar experience, reputation and ability. As for the "customary fee for like work" and "awards in similar cases," this matter is not distinguishable from the Fourth Circuit's affirmance of an attorney fee award of over $360,000 in a civil compensatory contempt matter where the complaining party sought enforcement of a consent decree. *Colonial Williamsburg*, 38 F.3d at 138. The Court therefore finds that none of the fees charged to GM by its counsel were excessive, inappropriate, or unwarranted. The Court will therefore proceed to the reasonableness of GM's recovery of these fees, with respect to each general task performed by GM's attorneys.

Respondent chooses in this case to indicate a plea which could be considered a "plea to the general issue," i.e., the common law defense of "prove it all—I deny it all." Fortunately common law pleading ceased to exist in most every area of the country more than a generation ago. (In most areas two or more generations ago.) The Court gave Respondent every opportunity to indicate what would have been reasonable attorney's fees for the contempt proceeding, as well as to state any specific objections to any portion of GM's claims. The Court intimated to Butler that the time expended by his attorneys would be indicative of what would be reasonable. He would not submit his own attorneys' time, nor has he indicated what would have been reasonable.[19/] As stated before, the Court has dealt with numerous fee petitions in the past, and will measure GM's claims accordingly. The Court feels strongly that it was reasonable for GM's attorneys to expend the time and effort applied to pursue these proceedings. The Court must determine, however, how much of the time was actually necessary and finds the following hours were reasonable and necessary.

The Court in addition notes that it has taken into account a 4% discount for all of the attorneys' fees incurred by GM through the law firm of Kirkland & Ellis in the year 1995. Based on the representations of GM counsel, that discount applies to no other year, and no other discount applied to GM's attorney bills.[20/]

[19/] As the Court discussed previously, Butler's suggestion of $5000.00 in attorneys fees, given the Fourth Circuit's contempt order and then length of these proceedings, might have been better left unsaid.

[20/] One billing rate of one partner in one firm was reduced by $25/per hour, and the Court has verified that the discount was applied to the submission to the Court through GM's attorney bills also submitted to the

(continued...)

A. Motion for Order to Show Cause why Butler should not be held in contempt, *Kirkland & Ellis*

Item	Title	Hours	Rate $/Hr	Description	Hrs. Awarded	Ttl $
109	Part.	0.25	375	Discussion re CA 4 strategy re possible contempt/sanctions motion.	0.25	93.75
110	Assc.	8.0	195	Draft motion for contempt in the 4th Circuit.	8.0	1560.00
111	Leg.A.	6.0	90	Assist with motion for order to show cause in the fourth circuit.	6.0	540.00
112	Part.	1.5	375	Telephone calls; review and edit motion for order to show cause.	1.5	562.50
113	Assc.	4.75	140	Begin memo on legal issues; conference re instruction from counsel; research legal issues; read our motion to show cause.	4.75	665.00
114	Assc.	1.5	175	Begin work on reply re GM's motion in the 4th Circuit for an order to show cause why he would not be held in contempt.	1.5	262.50
115	Assc.	4.25	175	Begin planning GM's reply brief on GM's motion in the 4th Circuit for an order to show cause why he should not be held in contempt.	4.25	743.75

[20/](...continued)
Court.

Finally, in the Court's most recent order it stated that there was an apparent discrepancy in the amount claimed by GM and the Court's independent calculation. GM's figure was smaller not because of any impropriety, but because of the discounts GM received and the withdrawal of one 15-hour time entry previously noted. However, in cross checking GM's bills with its submission, the Court did find a few errors in the rates charged on the submission to the Court (all the errors were in the respondent's favor). The Court has therefore resolved the discrepancies in respondent's favor, using the lower rate shown in the *in camera* submission.

116	Assc.	12.75	175	Research reply brief for GM's 4th Circuit Motion on contempt.	12.75	2231.25
117	Assc.	2.5	175	Research reply brief for GM's 4th Circuit Motion for an Order to Show Cause.	2.5	437.5
118	Assc.	2.25	140	Research legal and factual issues relating to 4th Circuit contempt hearing. Collect cases and articles for counsel.	2.25	315.00
119	Assc.	5.0	195	Fourth Circuit reply.	5.0	975.00
120	Leg.A.	3.0	90	Assist attorney in research.	3.0	270.00
Total						8,656.25

B. Supplemental Memorandum in support of motion for order to show cause, *Kirkland & Ellis*

Item	Title	Hours	Rate $/Hr	Description	Hrs. Awarded	Ttl $
121	Assc.	7.5	175	Work on GM motion to submit additional evidence on record for the hearing on the Court's order to show cause; research various legal issues re contempt.	7.5	1312.50
122	Leg.A.	2.5	90	Collect cases; collect requested materials for counsel.	2.5	225.00
123	Assc.	3.0	140	Research re legal issues for contempt; write brief memo.	3.0	420.00
124	Assc.	8.5	175	Draft, edit and finalize motion to submit additional documentary evidence into the record for the hearing on the Court's order to show cause. Consider and research various issues.	8.5	1487.50
125	Leg.A.	5.0	90	Proof and assemble exhibits to GM's submission of additional information to the Fourth Circuit.	5.0	450.00
126	Assc.	3.0	140	Draft affidavit related to Fourth Circuit filing.	3.0	420.00

Total	4,315.00

C. Prepare for and attend October 20 hearing, *Kirkland & Ellis*

Item	Title	Hours	Rate $/Hr	Description	Hrs. Awarded	Ttl $
127	Part.	4.0	260	Meetings to prepare for Fourth Circuit contempt hearing and collect materials; discuss with counsel.	4.0	1040.00
128	Part.	2.0	375	Meeting with counsel and client re hearing.	2.0	750.00
129	Part.	5.0	310	Preparation for hearing.	5.0	1550.00
130	Part.	4.0	310	Preparation for hearing.	4.0	1240.00
131	Assc.	6.0	175	Draft motion to submit additional evidence; research; analyze and prepare materials for contempt hearing.	6.0	1050.00
132	Part.	3.5	375	Preparation for 4th Circuit contempt hearing; telephone calls to counsel.	3.5	1312.50
133	Part.	5.0	310	Preparation for contempt hearing.	5.0	1550.00
134	Part.	6.75	375	Preparation for 4th Circuit contempt hearing; analysis of materials; review of case law.	6.75	2531.25
135	Assc.	1.75	140	Conference re further research for 4th Circuit.	1.75	245.00
136	Assc.	10.00	175	Draft motion to submit additional evidence; research, analyze and prepare materials for contempt hearing.	10.0	1750.00
137	Part.	5.0	375	Preparation for 4th Circuit contempt hearing; analysis of materials and case law.	5.0	1875.00
138	Part.	6.0	310	Preparation for 4th Circuit hearing.	6.0	1860.00
139	Assc.	2.0	140	Meet with counsel re contempt hearing.	2.0	280.00

140	Assc.	15.25	175	Research, analyze, and prepare materials for contempt hearing.	15.25	2668.75
141	Assc.	9.0	195	Prepare for contempt hearing.	9.0	1755.00
142	Part.	3.0	375	Travel (work during travel) to attend and participate in 4th Circuit contempt hearing.	3.0	1125.00
143	Part.	6.0	310	Prepare for 4th Circuit hearing.	6.0	1860.00
144	Leg.A.	6.5	90	Collect materials to prepare for 4th Circuit hearing.	6.5	585.00
145	Assc.	5.0	140	Research for contempt argument; edit papers at request of counsel.	5.0	700.00
146	Assc.	14.75	175	Preparation during travel to South Carolina for the contempt hearing; continue to prepare for the contempt hearing.	14.75	2581.25
147	Assc.	15.00	195	Prepare for the 4th Circuit contempt hearing with counsel in South Carolina.	15.0	2925.00
148	Part.	1.5	260	Various discussions re contempt hearing, and approaches to contempt hearing.	1.5	390.00
149	Part.	13.5	375	Preparation of 4th Circuit argument with counsel; analysis of cases; meeting with client.	13.5	5062.50
150	Part.	12.0	310	Prepare for oral argument; meet with counsel; review materials.	12.0	3720.00
151	Assc.	11.25	175	Continue preparation for the contempt hearing, attend hearing and post-hearing meetings; work on plane during return.	11.25	1968.75
152	Assc.	11.0	195	Prepare for contempt hearing.	11.0	2145.00
153	Part.	0.5	260	Update re contempt hearing.	0.5	130.00
154	Part.	8.5	375	Preparation for 4th Circuit argument; argument to the 4th Circuit; discussion of post-argument strategy; work on plane during return.	8.5	3187.50

155	Part.	7.5	310	Prepare for hearing; attend hearing before 4th Circuit; attend post-hearing discussion; work on plane during return.	7.5	2325.00
156	Part.	1.0	310	Follow-up matters re contempt hearing.	1.0	310.00
Total						50,472.50

D. Supplemental Memorandum responding to letter to *Moseley* Court and to the Fourth Circuit, *Kirkland & Ellis*

The Court has denied an award for task number 157 as GM failed to submit a copy of the bill in which this item appeared.

Item	Title	Hours	Rate $/Hr	Description	Hrs. Awarded	Ttl $
157	Assc.	2.5	195	Review plaintiffs' response in Fourth Circuit and draft response.	0.00	0.00
158	Assc.	7.0	195	Draft and edit motions regarding protective order and contempt supplement.	7.0	1365.00
159	Assc.	2.0	195	Finalize contempt supplement.	2.0	390.00
160	Assc.	1.25	155	Review legal authority; edit supplemental 4th Circuit filing seeking contempt order.	1.25	193.75
161	Assc.	8.0	195	Respond to reply brief; finalize and file contempt supplement.	8.0	1560.00
Total						3,508.75

E. Reply in Support of Supplemental Memorandum, Kirkland & Ellis

Item	Title	Hours	Rate $/Hr	Description	Hrs. Awarded	Ttl $

162	Assc.	0.5	140	Meeting with counsel re 4th Circuit reply.	0.5	70.00
163	Assc.	3.0	140	Draft reply to response to GM motion to supplement 4th Circuit record.	3.0	420.00
164	Part.	0.25	375	Telephone conversation with counsel re 4th Circuit record.	0.25	93.75
165	Assc.	0.5	155	Add paragraph to the 4th Circuit contempt filing.	0.5	77.50
166	Assc.	0.75	140	Edit 4th Circuit reply.	0.75	105.00
167	Part.	2.25	375	Review and edit 4th Circuit filings; telephone conversations with counsel.	2.25	843.75
Total						1,610.00

F. Supporting Memorandum for additional relief on motion for order to show cause, *Kirkland & Ellis*

The Court finds that this motion, unlike each and every other filing in this matter, was not necessary to the proceedings, and therefore denies GM recovery for these tasks.

Item	Title	Hours	Rate $/Hr	Description	Hrs. Awarded	Ttl $
168	Assc.	4.0	205	Draft 4th Circuit supplement on contempt.	0.00	0.00
169	Assc.	2.5	205	Draft 4th Circuit motion re contempt.	0.00	0.00
170	Leg.A.	2.0	94	Proof, cite-check supplement to 4th Circuit record on order to show cause.	0.00	0.00
171	Assc.	3.0	205	Work on 4th Circuit research.	0.00	0.00
172	Assc.	4.0	205	Review 4th Circuit cases.	0.00	0.00
173	Assc.	1.5	165	Edit draft of motion for expanded relief in 4th Circuit; research re same.	0.00	0.00

174	Assc.	1.25	205	Review 4th Circuit pleadings with counsel.	0.00	0.00
175	Part.	3.5	260	Work on edit and revision of 4th Circuit motion; conference with counsel re same.	0.00	0.00
176	Assc.	0.25	165	Collect cases for counsel to review.	0.00	0.00
177	Part.	3.0	390	Review and edit draft brief; review and analysis of case law.	0.00	0.00
178	Assc.	1.25	165	Review latest draft of motion for expanded relief; discuss same with counsel.	0.00	0.00
179	Part.	0.25	390	Telephone call with counsel re draft brief; discussion re appellate strategy.	0.00	0.00
180	Assc.	1.0	165	Edit draft motion for expanded relief in 4th Circuit; discuss same with counsel.	0.00	0.00
181	Part.	1.25	390	Review and edit draft 4th Circuit submission.	0.00	0.00
182	Assc.	1.75	205	Edit 4th Circuit brief.	0.00	0.00
183	Assc.	1.0	165	Edit and proofread latest draft of motion for expanded relief.	0.00	0.00
184	Part.	1.5	390	Review and edit final draft of brief; telephone call to counsel.	0.00	0.00
185	Assc.	1.25	205	Telephone conferences; finalize 4th Circuit pleading.	0.00	0.00
Total						0.00

G. Respond to Motion to Dismiss Contempt Proceedings, *Kirkland & Ellis*

Item	Title	Hours	Rate $/Hr	Description	Hrs. Awarded	Ttl $
186	Assc.	0.75	185	Review motion to dismiss contempt proceedings.	0.75	138.75

187	Leg.A.	1.0	44	Pull selected materials for reply brief, obtain cases from Westlaw.	1.0	44.00
188	Assc.	8.0	205	Review motion to dismiss and begin work on 4th Circuit papers.	8.0	1640.00
189	Assc.	12.5	185	Research re contempt; draft response to motion to dismiss the 4th Circuit contempt proceedings.	12.5	2312.50
190	Part.	1.5	390	Review and analysis of motion; review of draft outline; telephone conference with counsel.	1.5	585.00
191	Leg.A.	3.0	98	Cite check brief.	3.0	294.00
192	Assc.	9.75	165	Revise and edit response to motion to dismiss contempt proceedings; research and draft argument; review case law.	9.75	1608.75
193	Assc.	6.0	205	Draft sections for 4th Circuit papers.	6.0	1230.00
194	Assc.	9.0	185	Draft response to motion to dismiss 4th Circuit contempt proceedings.	9.0	1665.00
195	Part.	2.0	390	Review an edit draft response to motion.	2.0	780.00
196	Leg.A.	0.5	44	Index new pleadings, file all pleadings and correspondence.	0.5	22.00
197	Assc.	3.75	165	Conferences with counsel and document filing company; draft, revise, edit and file motion for extension of time.	3.75	618.75
198	Assc.	5.0	205	Edit 4th Circuit papers and re-write sections; call Clerk's office.	5.0	1025.00
199	Assc.	2.0	185	Edit draft reply to motion to dismiss.	2.0	370.00
200	Part.	1.5	390	Review and edit draft brief; discussion with counsel.	1.5	585.00
201	Assc.	2.0	185	Edit draft reply to motion to dismiss.	2.0	370.00
202	Part.	4.0	390	Research of cases cited; review and edit draft brief.	4.0	1560.00
203	Assc.	4.25	165	Revise and edit opposition to motion to dismiss contempt proceedings.	4.25	701.25

204	Assc.	6.5	205	Edit 4th Circuit papers.	6.5	1332.50
205	Leg.A.	5.5	44	Check record cited for 4th Circuit pleading, review transcript for quotes, review local rules; assist in preparation for filing.	5.5	242.00
206	Assoc.	7.25	165	Revise and edit response to motion to dismiss contempt proceedings; research for motion.	7.25	1196.25
207	Leg.A.	1.5	98	Proofread brief.	1.5	147.00
208	Assc.	2.0	205	Final edits on brief.	2.0	410.00
209	Assc.	4.0	185	Edit reply to motion to dismiss.	4.0	740.00
210	Assc.	5.0	165	Revise and edit response to motion to dismiss contempt proceedings.	5.0	825.00
211	Assc.	2.5	205	Finalize and file brief.	2.5	512.50
212	Assc.	0.5	185	Revise final draft of reply to motion to dismiss.	0.5	92.50
213	Part.	2.0	390	Final review and edit of draft brief; telephone call to counsel.	2.0	780.00
214	Assc.	2.0	205	Review latest 4th Circuit submission.	2.0	410.00
215	Assc.	0.25	165	Conferences with counsel re contempt proceedings and possible response to filing.	0.25	41.25
216	Assc.	0.75	185	Review reply memorandum in support of motion to dismiss 4th Circuit contempt proceedings; discuss with counsel.	0.75	138.75
217	Part.	0.5	390	Preparation of 4th Circuit strategy; telephone conference with counsel.	0.5	195.00
Subtotal						22,612.75
Total (less discount)						21,707.95

H. Motion for Order to Show Cause Why Butler Should not be Held in Contempt, *Nelson Mullins Riley & Scarborough (Nelson Mullins)*

Item	Title	Hours	Rate $/Hr	Description	Hrs. Awarded	Ttl $
218	WITHDRAWN					0.00
219	Assc.	0.6	105	Research re relief for violation of order; office conference with counsel.	0.6	63.00
220	WITHDRAWN					0.00
221	Assc.	1.6	105	Draft memorandum re possible violation of Fourth Circuit order.	1.6	168.00
222	WITHDRAWN					0.00
223	Assc.	0.9	105	Revise research memorandum.	0.9	94.50
224	Assc.	3.6	105	Review correspondence of plaintiffs' counsel in Moseley; analyze same.	3.6	378.00
225	Assc.	5.8	105	Analyze Moseley letter and Fourth Circuit order; draft memorandum to counsel.	5.8	609.00
226	Assc.	3.7	105	Draft memorandum to counsel re violation of Fourth Circuit order.	3.7	388.50
227	Part.	1.0	220	Review contempt research.	1.0	220.00
228	Part.	0.2	160	Review memorandum on contempt; communication with counsel re same.	0.2	32.00
229	Assc.	0.2	105	Office conference with counsel re research.	0.2	21.00
230	Part.	0.5	160	Review contempt motion.	0.5	80.00
231	Assc.	1.1	135	Work on motion for contempt; research re same.	1.1	148.50
232	Assc.	2.4	135	Work on motions; proposed orders for admission pro hac vice.	2.4	324.00
233	Part.	0.5	220	Review Motion for Contempt.	0.5	110.00
234	Part.	0.2	220	Review Butler letter on Contempt Motion.	0.2	44.00
235	Part.	0.2	220	Review Butler Motion for extension of contempt.	0.2	44.00
236	Part.	0.2	220	Review Butler response in Moseley.	0.2	44.00

237	Part.	0.3	220	Review Butler letter to Judge Thompson in Moseley.	0.3	66.00
Total						2,834.50

I. Prepare for and Attend October 20 Hearing, *Nelson Mullins*

Item	Title	Hours	Rate $/Hr	Description	Hrs. Awarded	Ttl $
238	Assc.	0.8	175	Assist in preparation for Fourth Circuit hearing.	0.8	108.00
239	Part.	6.2	90	Conference and meeting with counsel.	6.2	1054.00
240	Part.	5.1	140	Attend contempt hearing; conference after hearing; work on proposed order.	5.1	867.00
Total						2,029.00

J. Research Effect of Contempt Sanction, *Nelson Mullins*

Item	Title	Hours	Rate $/Hr	Description	Hrs. Awarded	Ttl $
241	Assc.	6.3	110	Research effects of contempt citation on contemnor.	6.3	693.00
242	Assc.	0.3	105	Research reference whether February 24, 1994, Order has been cited in later cases.	0.3	31.50
243	Assc.	2.1	110	Research re effect of contempt sanction.	2.1	231.00
244	Assc.	2.1	110	Research effect of contempt sanction.	2.1	231.00
245	Assc.	1.1	110	Research effects of contempt citation; office conference with counsel re same.	1.1	121.00
Total						1,307.50

K. Filing of Summary of Expenses pursuant to Fourth Circuit order, *Kirkland & Ellis*

Item	Title	Hours	Rate $/Hr	Description	Hrs. Awarded	Ttl $
246	Part.	0.5	390	Review of filings in 4th Circuit; leave voicemail message for counsel.	0.5	195.00
247	Assc.	2.75	165	Conferences with various counsel re billing for contempt proceeding; conferences with billing personnel regarding same. Review billing for expenses related to contempt.	2.75	453.75
248	Assc.	3.0	205	Work on fee submission; review billing records; review petition for rehearing.	3.0	615.00
249	Assc.	2.25	165	Review and compile bills for contempt proceeding.	2.25	371.25
250	Assc.	4.0	205	Work on fee submission; review hours and work descriptions.	4.0	820.00
251	Assc.	0.75	390	Review and analysis of petition for rehearing and discussion with counsel.	0.75	292.50
252	Assc.	4.75	165	Prepare fee submission for contempt hearing.	4.75	783.75
253	Assc.	8.0	205	Work on fee submission.	8.0	1640.00
254	Assc.	5.0	205	Finalize fee submission and draft motion to Court.	5.0	1025.00
Subtotal						6,196.25
Total (less discount)						5,948.40

L. Respond to Motion for Evidentiary Hearing, *Kirkland & Ellis*

Item	Title	Hours	Rate $/Hr	Description	Hrs. Awarded	Ttl $

255	Assc.	2.0	205	Work on response to 4th Circuit submission.	2.0	410.00
256	Assc.	2.0	205	Work on response to motion for an evidentiary hearing.	2.0	410.00
257	Assc.	0.75	165	Review contempt hearing motion; analyze possible responses.	0.75	123.75
258	Assc.	2.0	165	Review motion for an evidentiary hearing; draft response.	2.0	330.00
259	Assc.	1.5	205	Work on opposition to motion for an evidentiary hearing.	1.5	307.50
260	Assc.	1.5	165	Review cases cited in motion for an evidentiary hearing.	1.5	247.50
261	Assc.	6.25	165	Draft response to motion for an evidentiary hearing in contempt case; conferences with counsel re same.	6.25	1,031.25
262	Assc.	0.75	165	Revise and edit opposition to motion for hearing.	0.75	123.75
263	Part.	0.5	390	Discussion with counsel; review of 4th Circuit filing; response.	0.5	195.00
264	Assc.	1.0	165	Revise, edit and file opposition to motion for an evidentiary hearing.	1.0	165.00
265	Assc.	1.0	185	Edit response to motion for an evidentiary hearing.	1.0	185.00
Subtotal						3,528.75
Total (less discount)						3,387.60

M. In Camera Submission of Fees, *Kirkland & Ellis*

The Court finds that the time relative to the production of the submission must be analyzed more closely because everyone knew at this point who was likely to be paying the piper. The Court has reviewed the material and finds that seventy-five (75) percent of the work was necessary and twenty-five (25) percent was unnecessary.

Item	Title	Hours	Rate $/Hr	Description	Hrs. Awarded	Ttl $
266	Assc.	0.75	165	Read and analyze Court order; telephone calls with counsel.	0.6	99.00
267	Assc.	0.5	165	E-mail and voicemail with counsel; analyze Court order.	0.4	66.00
268	Part.	0.5	390	Review voicemail message; review and analysis of the District Court's order.	0.4	156.00
269	Leg.A.	4.0	66	Assist various attorneys, legal assistants in collecting documents, on line research in assist for brief preparation.	3.0	198.00
270	Assc.	1.25	165	E-mails with counsel; collect materials for attorneys' fees issues; voicemails to counsel.	0.9	148.50
271	Part.	6.0	220	Review motion for evidentiary hearing and Court Order and begin drafting supporting memorandum for fee submission.	4.5	990.00
272	Leg.A.	4.5	66	Miscellaneous request from attorney; review of bills and phone records; finding docket sheets and file duplication.	3.4	224.40
273	Part.	5.0	220	Work on fee submission memorandum.	3.8	836.00
274	Assc.	4.75	165	Conference with counsel re contempt submission to Court; review contempt billing; edit brief for contempt filing; review Court order and legal authority.	3.6	594.00
275	Assc.	2.25	145	Review previous filings and history of case. Meetings with counsel re preparation of brief and history of case. Edit and rewrite brief re in camera submission.	1.7	246.50
276	Part.	5.0	220	Review 4th Circuit cases; work on draft submission.	3.8	836.00

277	Assc.	0.75	145	Research re legal issues for submission.	0.6	87.00
278	Leg.A.	3.5	66	Assist in brief preparation and creation of exhibits.	2.6	171.60
279	Assc.	5.5	145	Conferences with counsel re in camera submission and legal issues. Edit and rewrite submission re in camera proceeding. Research re legal issues for submission.	4.1	594.50
280	Assc.	7.75	165	Prepare fee submission to Court; conferences with counsel re brief in support.	5.8	957.00
281	Leg.A.	6.0	66	Assist attorneys in brief preparation.	4.5	297.00
282	Assc.	0.25	145	Phone calls with counsel re brief in camera submission.	0.2	29.00
283	Assc.	10.5	165	Prepare fee submission to Court; conferences with counsel re same; revise and edit in camera memorandum in support of fee petition.	7.9	1303.50
284	Part.	9.0	220	Draft filing explaining responses to contempt.	6.8	1496.00
285	Assc.	7.75	165	Prepare fee submission; conferences with counsel re same; e-mails.	5.8	957.00
286	Part.	5.0	220	Go over work descriptions and fee calculations for submission.	3.8	836.00
287	Leg.A.	3.5	66	Assist attorney in brief preparation.	2.6	171.60
288	Assc.	2.0	145	Prepare for and conferences with counsel re in camera brief edits. Edits of in camera submission and preparation of fax to client.	1.5	217.50
289	Leg.A.	9.0	80	Prepare exhibits and cite check of General Motors In Camera Submission of Fees and Memorandum in Support.	6.8	544.00
290	Assc.	11.25	165	Prepare fee submission; letter to counsel; conference with counsel at various firms; revise and edit brief.	8.4	1386.00

291	Part.	7.0	220	Telephone calls with counsel re fee submission; review drafts re same; go over all numbers included for firms.	5.2	1144.00
292	Leg.A.	3.0	66	Miscellaneous assistance in brief preparation.	2.2	145.20
293	Part.	0.5	425	Review and approval of District Court submission re attorneys fees.	0.4	170.00
294	Leg.A.	11.25	80	Cite check and assemble exhibits for General Motors Submission of Fees.	8.4	672.00
295	Part.	4.0	290	Edit and revise brief submitted to Court; conference with client.	3.0	870.00
296	Part.	8.5	220	Finalize Court submission.	6.4	1408.00
297	Leg.A.	3.0	80	Assemble exhibits for brief.	2.2	176.00
298	Assc.	7.75	165	Revise, edit and file in camera submission for Court.	5.8	957.00
299	Part.	1.0	220	Draft letter to opposing counsel.	0.8	176.00
300	Leg.A.	1.0	66	Pull and photocopy various briefs and pieces of correspondence; fax at request of counsel.	0.8	52.80
301	Part.	3.5	290	Review and address letters to Court and suggested responses.	2.6	754.00
302	Part.	0.5	425	Review and edit letter to Covington & Burling re inadvertent mailing of in camera submission; discussion with counsel re same.	0.4	170.00
303	Part.	0.75	425	Telephone calls to counsel; review of letter from Covington & Burling; review draft response.	0.6	255.00
304	Part.	3.0	220	Respond to letter from P. Nickles; telephone conferences with client and counsel.	2.2	484.00
Subtotal						20,876.10
Total (less discount)						20,041.06

N. Respond to Respondent Motion re Settlement Agreements, *Kirkland & Ellis*

The time expended here was clearly foreseeable by Butler and his attorneys and was, unfortunately, necessary.

Item	Title	Hours	Rate $/Hr	Description	Hrs. Awarded	Ttl $
305	Assc.	1.25	165	Read, analyze and discuss filing with counsel; begin drafting response to same.	1.25	206.25
306	Part.	1.25	290	Conference with counsel re filing; review brief; prepare points of response.	1.25	362.50
307	Part.	3.0	220	Review latest submission; confer re response; research legal issues.	3.0	660.00
308	Assc.	1.75	165	Draft response to motion; research on legal issues related to settlements.	1.75	288.75
309	Part.	4.0	220	Evaluate law and work on response to motion to unseal.	4.0	880.00
310	Assc.	0.5	165	Revise and edit opposition to motion to compel settlement agreements.	0.5	82.50
311	Part.	1.5	290	Edit and revise draft response to filing; review another court's ruling re same; conference with counsel.	1.5	435.00
312	Part.	4.0	220	Edit response to motion.	4.0	880.00
313	Part.	2.0	220	Finalize brief in response to motion.	2.0	440.00
314	Part.	1.0	220	Telephone calls with local counsel to finalize and file brief.	1.0	220.00
315	Part.	4.5	220	Look at submission and prepare response.	3.0	660.00
316	Part.	1.5	290	Update re latest filing on settlement agreement; work on response.	1.5	435.00
317	Part.	0.5	290	Review of latest filing; e-mails re same.	0.5	145.00
Subtotal						5,695.00
Total (less discount)						5,467.20

O. Respond to Court's December 4 Order, *Kirkland & Ellis*

Item	Title	Hours	Rate $/Hr	Description	Hrs. Awarded	Ttl $
318	Assc.	4.5	165	Read and analyze Court order; research legal issues; conference with counsel re legal issues.	4.5	742.50
319	Part.	1.5	220	Review Court Order; review legal authorities in relation to same.	1.5	330.00
320	Part.	0.5	220	Telephone calls re scheduling and organization of response to order.	0.5	110.00
321	Assc.	4.0	165	Research legal issues in relation to fees; conference with counsel; telephone conferences with counsel.	4.0	660.00
322	Part.	1.5	220	Telephone calls re Order and response.	1.5	330.00
323	Assc.	3.25	165	Research on legal issues; begin drafting submission re fees and responses to interrogatories.	3.25	536.25
324	Assc.	1.25	165	Draft filing re privilege of billing records.	1.25	206.25
325	Part.	1.0	290	Review of Court order and memorandum re follow-up; conference with client.	1.0	290.00
326	Part.	1.0	220	Review Court order.	1.0	220.00
327	Assc.	5.75	165	Draft, revise and edit claim of privilege for billing records and response to interrogatories; review relevant cases.	5.75	948.75
328	Part.	0.75	290	Conference with client re Court's decision; circulate order.	0.75	217.50
329	Assc.	1.75	165	Research legal issues; revise and edit Court submission; review in camera submission.	1.75	288.75
330	Assc.	1.5	165	Revise and edit privilege submission.	1.5	247.50
331	Leg.A.	0.5	80	Research for attorney.	0.5	40.00

332	Part.	4.0	220	Draft sections of submissions.	4.0	880.00
333	Assc.	4.75	165	Revise and edit motion re privilege applied to billing records; conference with counsel.	4.75	783.75
334	Assc.	3.0	165	Response to Court interrogatories; revise and edit privilege brief.	3.0	495.00
335	Part.	3.0	220	Work on interrogatories responses.	3.0	660.00
336	Assc.	3.25	165	Draft and revise privilege brief and response to interrogatories.	3.25	536.25
337	Leg.A.	2.5	44	Assisting with brief.	2.5	110.00
338	Part.	2.0	290	Review draft of submissions to Court and mark edits re same; discuss suggestions with counsel.	2.0	580.00
339	Assc.	4.75	165	Draft and edit brief in support of privilege for billing records; conference with client re same.	4.75	783.75
340	Leg.A.	5.0	80	Cite check brief and prepare exhibits for brief in support of protection for confidential and detailed billing records.	5.0	400.00
341	Part.	1.0	220	Finalize Court submissions.	1.0	220.00
342	Assc.	3.75	165	Edit and file response to interrogatories and brief supporting protection of billing records.	3.75	618.75
343	Part.	0.5	425	Review of General Motors' response to court's interrogatories and draft brief.	0.5	212.50
Subtotal						11,447.50
Total (less discount)						10.989.60

P. Reply/December 4 Order, *Kirkland & Ellis*

The Court has reviewed the material and finds that sixty (60) percent of the work was necessary and forty (40) percent was unnecessary.

Item	Title	Hours	Rate $/Hr	Description	Hrs. Awarded	Ttl $
344	Assc.	3.75	165	Read and discuss response to GM submission on fees; begin drafting response.	2.2	363.00
345	Part.	1.5	315	Review filing re sanctions award, and outline key issues to include in response, and provide to counsel.	0.9	283.50
346	Part.	3.0	220	Review filing and outline response.	1.8	396.00
347	Assc.	1.0	165	Analyze response on fees; prepare response; voicemails to counsel.	0.6	99.00
348	Leg.A.	5.0	80	Review of response to the court's order of December 4, 1995 for various court orders, memoranda, trial transcripts and motion and gather all items for counsel.	3.0	240.00
349	Part.	2.0	220	Work on reply brief.	1.2	264.00
350	Leg.A.	7.5	80	Review of response to the court's order of December 4, 1995 for various court orders, memoranda, trial transcripts and motions. Gather all items used as references for counsel.	4.5	360.00
351	Part.	3.0	220	Work on reply brief.	1.8	396.00
352	Assc.	7.75	165	Read cases cited in opposing brief. Draft, revise and edit response to motion.	4.6	759.00
353	Assc.	8.75	165	Draft, revise and edit response to filing.	5.2	858.00
354	Assc.	6.25	165	Draft, revise and edit reply to filing for review by counsel.	3.8	627.00
355	Part.	3.0	220	Work on reply brief.	1.8	396.00
356	Part.	2.5	315	Review, revise and edit draft brief re sanctions; conference with counsel re same.	1.5	472.50
357	Part.	7.0	220	Work on reply brief.	4.2	924.00

358	Assc.	6.75	165	Draft, revise and edit reply to submission.	4.0	660.00
359	Leg.A.	7.5	80	Research of pleadings re contempt proceeding.	4.5	360.00
360	Part.	0.75	315	Conference with counsel re hearing and final brief.	0.4	126.00
361	Assc.	5.75	165	Final revisions and filing of contempt rely.	3.4	561.00
Total						8,145.00

Q. Prepare for and Attend January 30 Hearing, *Kirkland & Ellis*

The Court has reviewed the material and finds that fifty (50) percent of the work was necessary and fifty (50) percent was unnecessary.

Item	Title	Hours	Rate $/Hr	Description	Hrs. Awarded	Ttl $
362	Leg.A.	3.0	80	Index and file new pleadings and correspondence.	1.5	120.00
363	Part.	1.0	220	Prepare for oral argument.	0.5	110.00
364	Leg.A.	4.5	80	Prepare selected pleadings for review by counsel in preparation for oral argument.	2.2	176.00
365	Assc.	0.5	165	Supervise collection of materials for counsel for preparation for oral argument; arrange motor travel to Norfolk for argument.	0.3	49.50
366	Leg.A.	7.5	80	Research various pleadings to produce notebook for counsel.	3.8	304.00
367	Assc.	2.25	165	Review filings and orders in contempt matter since motion for order to show cause; prepare materials for counsel to review for contempt hearing; make arrangements for preparation.	1.1	181.50

368	Assc.	0.75	165	Review reply brief; voicemails to counsel regarding issues at upcoming hearing.	0.4	66.00
369	Part.	0.5	425	Preparation for District Court hearing; telephone calls (voicemail messages) from counsel.	0.2	85.00
370	Assc.	2.25	165	Review cases cited in reply brief; prepare memorandum to counsel re same.	1.1	181.50
371	Leg.A.	5.0	80	Research and gather cases for counsel in preparation for oral argument.	2.5	200.00
372	Part.	1.25	425	Preparation for District Court argument.	0.6	255.00
373	Assc.	3.5	165	Draft memorandum to counsel regarding issues to be argued; review pleadings filed in Fourth Circuit and District Court; conferences with counsel; read cases cited by respondent.	1.8	297.00
374	Part.	2.0	425	Discussion with counsel re evidentiary hearing issues; preparation for District Court hearing; analysis of counsel's case overview.	1.0	425.00
375	Part.	5.0	220	Prepare for oral argument.	2.5	550.00
376	Assc.	3.0	165	Collect materials for counsel's review; draft outline of oral argument; conferences with counsel.	1.5	247.50
377	Part.	1.5	315	Conference with counsel re preparation for hearing; analyze arguments and outline.	0.8	252.00
378	Part.	4.0	220	Prepare for oral argument.	2.0	440.00
379	Assc.	9.75	165	Research legal issues re fees; conferences with counsel; draft memoranda to counsel; conference with counsel regarding issue for hearing.	4.9	808.50
380	Part.	0.5	425	Review of draft Q's and A's; analysis of draft themes for District Court oral argument; preparation for oral argument.	0.2	85.00

381	Part.	4.0	220	Preparation for oral argument; draft memorandum for counsel. Discuss oral argument strategy with client; review Fourth Circuit cases.	2.0	440.00
382	Assc.	1.25	165	Prepare for contempt hearing; draft memoranda to counsel; conference with counsel regarding hearing.	0.6	99.00
383	Part.	3.5	425	Prepare for District Court hearing.	1.8	765.00
384	Assc.	0.75	165	Review and collect materials for contempt hearing.	0.4	66.00
385	Part.	6.0	425	Preparation for District Court hearing.	3.0	1275.00
386	Assc.	1.0	165	Research legal issues regarding fees; telephone conferences with counsel.	0.5	82.50
387	Leg.A.	2.0	80	Research court orders pertaining to attorney depositions for counsel.	1.0	80.00
388	Part.	11.5	425	Preparation for District Court hearing; travel to Norfolk (work in car); meeting with counsel and client re District Court hearing strategy; review and analysis of Moseley and Cockrum records.	5.8	2465.00
389	Part.	10.0	220	Travel to Norfolk by car; work during travel; prepare with counsel and client for oral argument; review cases cited by respondent.	5.0	1100.00
390	Assc.	10.75	165	Travel to Norfolk, conference en route, conferences with counsel and client; research 4th Circuit cases relating to legal issues for oral argument; prepare materials for oral argument.	5.4	891.00
391	Part.	3.0	315	Review of materials to prepare for sanctions hearing in Norfolk.	1.5	472.50
392	Part.	2.0	425	Preparation for and participation in District Court hearing in Norfolk; attendance at settlement conference with Magistrate Judge Miller.	1.0	425.00

393	Part.	6.0	220	Meet with counsel to prepare for oral argument; moot court; attend hearing and meeting with Magistrate Judge.	3.0	660.00
394	Assc.	7.5	165	Prepare for and attend contempt damages hearing; pre-argument conference with counsel; post-argument conference argument with team regarding strategy.	3.8	627.00
395	Part.	6.0	315	(Norfolk, VA) Prepare for Court hearing; read materials; conference with counsel; attend Court hearing; debrief after hearing.	3.0	945.00
Subtotal						15,226.50

The Court finds that the total sum of reasonable attorneys' fees through January 30, 1996 for this contempt proceeding was $165,646.81 and recommends awarding the same to GM for this portion.

Epilogue

> Pride goeth before destruction, and a haughty spirit before a fall.[21/]

The Court thus finds that Respondent's misconduct was the sole proximate cause of $1613.50 in attorneys' fees in *Moseley*. The Court further finds that Respondent's misconduct was a the proximate cause of an additional sum of $17,284.00 in GM attorneys' fees in *Moseley* and $5997.00 in *Cockrum*. Thus the total "harm" to GM caused by Respondent in attorneys' fees for these two matters is $24,894.50. In sum, the undersigned recommends that the total proper amount to be assessed against the Respondent Butler under the contempt decision is $24,894.50 for GM's

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[21/] Proverbs 16:18.

attorneys' fees in correcting the effects of Butler's misconduct in *Moseley* and *Cockrum*, and $165,646.81 in attorneys' fees for this contempt proceeding through the period ending January 30, 1996, for a total award to Petitioner of $190,541.31.

A copy of this Report is this day being forwarded to lead counsel for the parties, with a copy to be filed in the United States District Court for the District of South Carolina and a copy to be filed with the United States Court of Appeals for the Fourth Circuit.

IT IS SO ORDERED.

/s/

UNITED STATES DISTRICT JUDGE

at Norfolk, Virginia

July 26, 1996

APPENDIX C

Filed:
March 23, 1994

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 94-1011
(CA-93-1278-6-3)

In Re: GENERAL MOTORS CORPORATION,
a Delaware Corporation,

Petitioner.

ORDER

We have examined petitioner's March 4, 1994, response to the recusal order issued by the Honorable G. Ross Anderson, Jr., on February 28, 1994, and respondents' reply memorandum, filed March 18, 1994. Petitioner contends that portions of the recusal order are improper and should be stricken. We agree.

Judge Anderson, in the recusal order, recused himself from this case because he held that, based on certain of his actions, a reasonable person could possibly question his "fairness and impartiality." Recusal Order at 59. Consistent

with this holding, he vacated five discovery orders, all dated December 30, 1993, which compelled petitioner, over its objections of attorney-client and work-product privileges, to produce certain documents and allow the taking of certain depositions. The apparant ground on which these orders compelled discovery in spite of these privileges was that respondents had shown that petitioner may have destroyed documents relevant to this case. Judge Anderson quite appropriately vacated these orders because the possible appearance of bias, for which he recused himself, could have been viewed as having tainted them.

At the same time, however, Judge Anderson in his recusal order made new findings of fact and conclusions of law on the very issues addressed by the discovery orders that, because of a possible appearance of bias, he found necessary to vacate. For example, he stated:

> A review of the thousands of documents in this case ... reveals a substantial likelihood that perhaps perjury and the systematic destruction of documents involving gross misconduct by General Motors' regional counsel occurred. Evidence of the commission of such activity by and with the knowledge of those General Motors' regional counsel would defeat the attorney-client and work-product privilege asserted by General Motors.

Recusal Order at 48.

For the same reason that it was appropriate to vacate the discovery orders, it was improper to make new findings of fact and conclusions of law on the issues addressed by these orders. As a result, section III of the recusal order, as well as any other statements in the order relating to the possible destruction of documents, perjury by petitioner or petitioner's counsel, or applicability of the crime-fraud exception of the

attorney-client and work-product privileges to the facts of this case, are hereby stricken from the order and should not hereafter be cited as authority.[1/] We also strike all findings or conclusions regarding the liability or culpability of petitioner's counsel with respect to the pending motion for sanctions under Fed. R. Civ. P. 11. Further, we wish to make quite clear that any issue relating to any of the matters expunged from the recusal order that arises before the district judge to whom this case is assigned should be adjudicated by him *de novo* with a clear mind and a clean slate.

This matter is remanded to the district court for further proceedings consistent herewith.

Entered this twenty-third day of March, 1994.

/s/
Circuit Judge

/s/
Circuit Judge

/s/
Circuit Judge

[1/] *See, e.g.*, March 2, 1994, letter from L.L. McBee, Jr., Esq., to Judge Gerald V. Underwood, California Superior Court (citing Judge Anderson's recusal order's findings that there was "a substantial likelihood that perhaps perjury and the systematic destruction of documents involving gross misconduct by General Motors' regional counsel occurred").

APPENDIX D

FILED: October 6, 1994

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 94-1011
(CA-93-1278-6-3)
(CA-93-1279-6-3)
(CA-93-1280-6-3)

In Re: GENERAL MOTORS CORPORATION,
a Delaware Corporation,

Petitioner.

ORDER TO SHOW CAUSE

Petitioner General Motors Corporation has moved this Court for an order requiring plaintiffs' counsel, Mr. James E. Butler, Jr., to show cause why he should not be held in civil contempt, or other appropriate sanctions imposed, for violating this Court's order of March 23, 1994. Mr. Butler, by counsel, has field a response in opposition.

The Court orders Mr. Butler to appear personally on October 20, 1994, at 11:00 a.m., at the United States Bankruptcy Court Courthouse, 1100 Laurel Street, Columbia, South Carolina, to show cause why he should not be held in contempt for violating this Court's order of March 23, 1994.

By Order of the Panel

/s/ Bert M. Montague
Clerk

APPENDIX E

UNITED STATES OF AMERICA
IN THE FOURTH CIRCUIT COURT OF APPEALS

In Re: GENERAL MOTORS

Transcript of argument in the above matter, Docket Number 94-1011, on the 20th day of October, 1994, before the Honorable Donald Russell, Clyde Hamilton and Karen Williams, Judges.

APPEARANCES:

James Crawford Roberts,
Attorney for James Edward Butler, Jr

Kenneth Winston Starr,
Attorney for General Motors

JUDGE RUSSELL: We're prepared to hear you now in this matter that is set for hearing this morning at 11:00 o'clock. We're prepared to hear first Mr. Starr.

MR. ROBERTS: If Your Honor please, I wonder if I might address the Court on a procedural inquiry before we commence with the argument?

MR. STARR: Sure. Let's hear the inquiry.

MR. ROBERTS: If Your Honor please, I'm James C. Roberts with the firm of Mays & Valentine in Richmond,

representing Mr. Butler. The Notice of this Court speaks in terms of civil contempt and the motion addressed to the Court by General Motors in its caption is referenced "Civil Contempt" but there is a reference in there to civil or criminal contempt. I simply want to make sure that everybody in the Courtroom has the same idea of what the nature of the proceedings are. We view this as a civil contempt hearing only and not a criminal contempt hearing, which it could not be under these circumstances.

JUDGE RUSSELL: What say you, Mr. Starr?

MR. STARR: (pause) May it please the Court, —

JUDGE RUSSELL: Do you have any objection to the statements just made?

MR. STARR: I believe, Judge Russell, that it is in the discretion of this Court as to how this proceeding should be conducted and styled. It is my reading of this Court's Order that this is an Order to Show Cause why he should not be held in contempt. I view the Court's order as open-ended in that respect, Your Honor. If I may proceed?

JUDGE RUSSELL: Mr. Roberts, we will let you refer to it in your main argument. This is a procedural matter that we can dispose of without much difficulty if you want to say some words to it in connection with your main argument.

MR. ROBERTS: I shall do so, Your Honor.

MR. STARR: May it please the Court, as this initial colloquy indicates, this matter comes before this Court pursuant to its Order to Show Cause why Mr. Butler who has been directed personally to appear should not be held in contempt for the violating of this Court's Order of March 23.

The background can be very briefly stated, if the Court pleases. In the course of a personal injury action in United States District Court for the District of South Carolina, the style of which is *Cameron v. General Motors*, District Judge Anderson entered an order recusing himself from participation in the case. Judge Anderson took that action under a specific directive from this Court. In doing so, however, Judge Anderson issued a lengthy order which went considerably beyond the recusal issue including making findings of fact that, with all respect, we believe were wholly unjustified and which were potentially quite prejudicial to General Motors in the *Cameron* and other pending litigation. In response to General Motors' motion, this Court entered its order of March 23rd granting the motion to strike certain portions of Judge Anderson's order. With your indulgence, I would draw the Court's attention in particular to pages two and three of its order and, if I may, I would like to quote for the record of these proceedings the language of that order: "As a result, Section 3 of the Recusal Order as well as any other statements in the order relating to the possible destruction of documents, perjury by Petitioner or Petitioner's counsel, or applicability of the crime fraud exception of the attorney-client and work product privileges to the facts of this case are hereby stricken from the order and should not hereafter be cited as authority." There's a footnote. The footnote identifies an example—not exhaustive—illustrative of citing as authority. That example is a letter—a letter from plaintiff's lawyer in California to a California state judge. In that letter, the plaintiff's lawyer cites to Judge Anderson's order the specific language of the order, indeed, which this Court was ordering to be struck. It bears noting that in the wake of this Court's order striking Section 3 and other statements, that Mr. Butler did not petition the panel for rehearing. Mr. Butler did not file a suggestion for rehearing *en banc*, suggesting that the issue merited the attention of the full Court. What he did do was to issue a press statement. That statement, in the record in

these proceedings, trumpets Judge Anderson's findings and notes, among other things, Mr. Butler's concern that 'this Court had even entertained General Motors'—his word—plea. And also found that the procedure of this Court, in his words, was objectionable. As he saw it, no part of Judge Anderson's order should have been struck. Now, following this Court's action, following the press statement, the underlying action in *Cameron* proceeded. It was, as the Court knows, reassigned to United States District Judge Hayden (? spelling) sitting by designation. He has since been guiding, very ably, the pre-trial conduct of that case, including—

JUDGE WILLIAMS: Mr. Starr, the press release, do you say that that violated the Court's order?

MR. STARR: We do not. We thought it was disrespectful but we did not think that it was, standing alone, contumacious, Your Honor. We think it does, however, set the stage and the context for that which was to follow. If I may, to interrupt the chronology ever so briefly, part of the submission before this Court is that General Motors has not quickly enough filed a motion to show cause. We have been, if I may say so, quite prudent and cautious. We filed the Motion for an Order to Show Cause when we believed, in good faith, that there were grounds to assert that the order of this Court had been violated. Judge Hayden has been resolving a variety of questions, discovery issues, and the like. But in the meantime, Mr. Butler was not simply pursuing the *Cameron* litigation in South Carolina, he was also actively pursuing other litigation against General Motors and other courts, including—and this brings us to the critical events—a State Court proceeding in Georgia in Fulton County known as *Mosely v. General Motors*. It is specifically Mr. Butler's action in that case that in our view plainly unmistakably violates this Court's March 23 order. Very briefly, Mr. Butler's widely publicized verdict in that case, which he has

trumpeted to this Court including serving upon this Court as an exhibit *The American Lawyer* piece about that case, was reversed in a unanimous opinion by the Georgia Court of Appeals finding a whole host of trial errors and remanding the case for a retrial. He did, let the record show, file a Petition for Rehearing in that case. That Petition for Rehearing was denied, accompanied by an opinion of one of the Judges of the Court who found the entire submission highly disrespectful, treating the Court, in the words of a Judge in Georgia, as subhuman. Now, in those proceedings on remand in the *Mosely* case following the reversal of his verdict, Mr. Butler has been pressing for additional discovery including the depositions of outside counsel to General Motors, relief that he has obtained here in United States District Court before Judge Hayden, accompanied with a number of safeguards in light of the highly unusual nature of that proceeding. In the course of that proceeding, Mr. Butler submits the nine-page letter which is before the Court. This is a letter dated August 30 to Judge Thompson. It is quite striking in that it is not a one-page, brief letter. It is a lengthy, single-spaced document with no fewer than ten footnotes, quite elaborate footnotes. This is a brief or a motion by any other name but in letter form which is, apparently, permitted in the informal structure of Fulton County. I draw the Court's attention then to page three of the letter to Judge Thompson in *Mosely*, who had presided over the initial trial. At page three in block quotes is a quotation by Mr. Butler of the very language that this Court had struck. But it is more. If the Court pleases, Mr. Butler not only quoted the language, he highlighted it. That seemingly trifling aspect of his presentation to Judge Thompson is quite telling. If the Court pleases, note that he underscores certain words that not even Judge Anderson had highlighted, but he leaves other words non-highlighted in the very two lines that he would lift up for Judge Thompson's review. He does not highlight the qualifying words that Judge Anderson used—"perhaps;" he skips over that but then

highlights the inflammatory "perjury and the systematic destruction of documents," calumning General Motors and its counsel. What does this letter teach us about Mr. Butler's conduct that is now being weighed in the balance of this Court? It tells us, one, that this letter is what it purports to be—a very thorough, complete recitation to Judge Thompson of the history of the litigation since *Mosely*. Second, and this is critical, it is written not simply for informational purposes, it is written with an outcome purpose. It is joining issue; by its terms, the letter joins issue with what King and Spalding on behalf of General Motors was suggesting in most recently a letter of August 28th. It is discussing very sensitive issues, including the depositions of lawyers. It is discussing claims of privilege in highly sensitive documents. It is more than that; this lengthy, single-page submission is expressly designed to bring action about by Judge Thompson, to urge a specific course of action upon the Court.

JUDGE WILLIAMS: Do you find it objectionable that the order of Judge Ross Anderson was attached and enclosed with this letter?

MR. STARR: Do I find it objectionable?

JUDGE WILLIAMS: Yes.

MR. STARR: I do—

JUDGE WILLIAMS: Or is the objection only the highlighted portions in—

MR. STARR: It is na—I believe that was part of the contumacious conduct of highlight—of—this is presumably what he intended for the Judge to read with some care but I believe it was a violation of this order to, in fact, be accompanying and thus, as I see it, citing as authority using

for purposes of persuading a Court which is the very definition of citing as authority that Mr. Butler now uses for this Court. Mr. Butler then goes on, unless there be any doubt and I don't see how reasonable minds could entertain such a doubt, in the very next paragraph at page three, and I'm nearly through with the analysis of this letter, in recusing himself, Judge Anderson did what? Vacated several of his discovery orders and then notes the designation of Judge Hayden. He is going into the process that unfolded after this language was penned by Judge Anderson. He still does not flag the fact that this language had been ordered stricken. It seems to us that a careful review of the letter of August 30 shows that this is clear, it is absolutely flagrant, written for a purpose of moving a Court to action. Now, what is the response as I understand it? Very briefly, first and throughout his submission to this Court, Mr. Butler says, "It was a mistake. It was an error." Indeed, he says at one point, "It was an error of judgment." That is critical. He came to judgment. He believes that judgment now to have been an error. It was more. It was contumacious. It was a judgment, an act, a deliberate act. Moreover, we have seen his apologies before. In the record is a letter to Judge Thompson dated September 20th, 1994, quite recent. This is in response to a colloquy with Judge Hayden, now presiding in *Cameron*. And in light of another part of this letter, which is not contumacious but is misleading, Judge Hayden took umbrage at a hearing in September about the description in the August 30th letter as if he was a Judge who had made certain findings against General Motors. He had made no such findings. Mr. Butler apologized on the record of that proceeding before Judge Hayden. He then wrote Judge Thompson in *Mosely*, the recipient of this dynamite letter, and said to Judge Thompson, may I read the third paragraph on page five of this letter, the contumacious part is on page three, refers to two Federal Judges. Mr. Butler now has his highlighter going again. "This sentence is misleading and inaccurate." He

corrects the record with respect to that, and then he goes on to say, "This was an inexcusable and careless blunder on my part." Inexcusable, he says, on his part. What this letter does not contain and what the record in *Mosely* still does not contain is a letter to Judge Thompson correcting the record. As we stand here this morning, the record in *Mosely* in that respect in terms of the violation of this Court's order stands uncorrected. Mr. Butler's response to that is this: "It was redeemed by the letter of Frank Jones, a great and distinguished lawyer at King and Spalding, on September 2nd," calling into question the appropriateness, and if I may so, in a genteel way, in a way that becomes an officer of the Court, calling Judge Thompson's attention to the inappropriateness of Mr. Butler's submission. If I may just finish that thought, with the Court's indulgence, I will be very brief. This records stands uncorrected in *Mosely*. In our judgment, with all respect, there is no explanation. It is deliberate, it is his judgment. And we—and I will address this on rebuttal—have specific suggestions as to how we think this Court should now proceed to vindicate what we think is at stake, Judge Russell, the dignity of this Court. I thank the Court for its attention.

MR. ROBERTS: Thank you. If Your Honors please, again I'm James C. Roberts, together with my partner, Mr. Jim Crockett, appearing on behalf of Mr. Butler. Mr. Starr, indeed, would like to have this proceeding open-ended. He would like to ignore the decision this year of the U.S. Supreme Court in the *Bagwell* case. He would like to hold on until rebuttal to make suggestions to you as to what he thinks you ought to do. We would like for you not to remember that *Bagwell* says that this is not a criminal contempt proceeding, and it may not be a criminal contempt proceeding. It does not meet the notice requirements. It is not a criminal trial and *Bagwell* instructs fully that a criminal contempt proceeding is a criminal trial surrounded by all the criminal law procedural

due process guarantees, including the right to a trial by jury. This, Your Honors, is a civil contempt proceeding and that alone. As such, Mr. Starr would even have no right to participate were it criminal in nature. In the case of *U.S. v. Young* decided by the Supreme Court, that Court reversed a criminal contempt conviction simply because the Court permitted, instead of having the U.S. Attorney prosecute the action which is the way it should be done, by appointing a private litigant, just as GM is here, to serve as prosecutor of the case. For that reason alone, the case was reversed by the U.S. Supreme Court. *Bagwell* also instructs us in the area of what is meant by civil contempt and how civil contempt remedies must flow from convictions of civil contempt.

JUDGE WILLIAMS: Mr. Roberts, do you think that the letter of September 2nd to Judge Thompson with its enclosure of Judge Ross Anderson's letter, did that violate this Court's order?

MR. ROBERTS: Are you referencing the August 30 letter, Judge Williams?

JUDGE WILLIAMS: I'm sorry, the August 30 letter.

MR. ROBERTS: I do not. I definitely do not. If you take—

JUDGE WILLIAMS: If it were found to violate this Court's order, then do you think that that would be a subject of criminal contempt or a subject of civil contempt under *Bagwell*?

MR. ROBERTS: Well, I don't think—obviously, I don't think that under *Bagwell* it could be. I don't think it can be either, frankly, because if I may elaborate on that, Judge Williams, the only use of civil contempt is for two things:

number one, to compensate a party that has suffered damages as the result of a failure to abide by a court order. There is no damage that has been suffered by GM. Virtually, the day that Judge Thompson got the letter—

JUDGE HAMILTON: Wait a minute. You're saying there's no damage?

MR. ROBERTS: There's no damage to General Motors as a result of that letter, even if you find it to be—

JUDGE HAMILTON: Well, it was a misrepresentation, was it not?

MR. ROBERTS: If it's misrepresentation, General Motors has an adequate remedy by going to the Fulton County State Court and saying, "This is a miscitation."

JUDGE HAMILTON: What about the integrity of this Court?

MR. ROBERTS: The integrity of this Court is very much involved.

JUDGE HAMILTON: Do you think that that is involved in this matter at all?

MR. ROBERTS: That's why this Court is here. There's no question about that. I do not believe that this letter is an act that is violative of the integrity of this Court, the dignity of this Court in the circumstances.

JUDGE HAMILTON: Are you going to sit here and tell me—I hope you're not—that in the context in which those words should not be cited with authority, in the context in which that order was drawn that that wasn't a prohibition?

Are you going to further insult this Court by telling us that?

MR. ROBERTS: No, I'm not doing that. What I'm saying is this. Let's assume that this Court finds that it's a violation of the order. There is—

JUDGE RUSSELL: Well, doesn't Mr. Wooten admit that?

MR. ROBERTS: You mean Mr. Butler?

JUDGE RUSSELL: Mr. Butler.

MR. ROBERTS: Mr. Butler did not consider himself to be violating the order with the spirit of the letter that he wrote, the purpose of the letter that he wrote, Judge Russell, but—

JUDGE RUSSELL: Well, how do you figure that now? I'd like to have a little explanation of how a person who says that it was inexcusable and it was in error and wrong, how can you say that it was nothing.

MR. ROBERTS: Well, I don't mean to be—

JUDGE RUSSELL: He's writing a letter—

MR. ROBERTS: I don't mean to convey the impression, Judge Russell, that it was nothing. It was an error, it was a mistake, it is one for which he's apologized, one for which he is sorry.

JUDGE WILLIAMS: But has he ever set the record straight himself before Judge Thompson?

MR. ROBERTS: Yes. He really didn't have to set the

record straight before Judge Thompson because Judge Thompson got a hand-delivered letter on September the 2nd which pointed out the fact that it had been stricken.

JUDGE HAMILTON: Who wrote that letter?

MR. ROBERTS: That letter was written by King and Spalding.

JUDGE HAMILTON: They're representing General Motors.

MR. ROBERTS: Yes.

JUDGE HAMILTON: That didn't represent your client.

MR. ROBERTS: No, I'm not saying that. I'm saying that—

JUDGE HAMILTON: Given the complexity and the setting of this case, why would Judge Thompson ever assume that anything General Motors said would be agreed to by Mr. Butler or anything that Mr. Butler said would be agreed to by General Motors? (pause)

MR. ROBERTS: Judge Hamilton,—

JUDGE HAMILTON: Why would he have taken that as setting the record straight when they haven't agreed on anything else much before it?

MR. ROBERTS: Judge Hamilton, in addition to—and you have to read a fairly lengthy transcript to find this; it's among the exhibits—but in addition to the September 2nd letter that he received by hand on September the 2nd stating the fact that it had been stricken, containing a copy of this

Court's order showing that it had been stricken, they had a status conference six days later on September the 8th, a lengthy status conference, in which nobody, General Motors or Butler, made any specific reference to this at all and that's the meeting at which Judge Thompson said to everybody in the Courtroom, "Stop this striking and warfare among the lawyers and get on with the trial."

JUDGE WILLIAMS: Do you think it would be striking or warfare for Mr. Butler to say to Judge Thompson, "Judge Thompson, I was in error and violated the Fourth Circuit Court's order?"

MR. ROBERTS: I do not. I do not.

JUDGE HAMILTON: Mr. Roberts, as a distinguished attorney in your own rights, don't you really think that as Mr. Butler has said in his letter, "It was an ill-advised statement, an error of judgment, it was a mistake," he admits he was mistaken, etc., don't you think that if this was just truly an inadvertent mistake on his part that the first person, the first entity he would have wanted to apologize or explain that to would have been Judge Thompson's Court? Not let somebody else say it for him but get over there himself and say, "Judge, I'm terribly sorry. I I— whatever excuse he's giving us now, I suppose, "and I want to set this record straight?" Wouldn't you do that?

MR. ROBERTS: I would like to think so, Judge Hamilton.

JUDGE HAMILTON: I'd like to think so, too.

MR. ROBERTS: But in the circum—

JUDGE HAMILTON: I'd like to think any lawyer would

do that.

MR. ROBERTS: Yes. And let's look, if we might, at some of the circumstances that surrounded the letter because this is not an occasion, certainly in Mr. Butler's mind, where he's endeavoring to cite this as authority for a proposition.

JUDGE WILLIAMS: Then why would he enclose a copy of the entire order and cite the section of it? Just as a historical reference, even though he knows that the order, a large portion of it, has been stricken (pause)—

MR. ROBERTS: I think that's—

JUDGE WILLIAMS: —from the record and make no reference to the fact that any portion of that has been stricken or that the portion that he's underlined and highlighted is his emphasis added and not that of the Court? Is that a part of the historical reference at best?

MR. ROBERTS: The writing of this letter, the entire purpose of the letter, was to let Judge Thompson know that since the first *Mosely* case—you've got to bear in mind that this was in the context of a series of letters started by General Motors' counsel, starting August 11th. This case has been remanded. We want to re-open all discovery and have it virtually unbridled. He kept writing back to the Judge, when he would get a copy of their letter to the Judge, saying, "That is not what we're here to do."

JUDGE RUSSELL: Let me ask you this question. I have a thing that lacks peace; significant. Why was the word "perhaps" omitted in the body of the letter when he was quoting the language of Judge Anderson?

MR. ROBERTS: I can't answer that, Judge Russell. I

don't know the answer to that and—

JUDGE RUSSELL: Well, isn't that a significant word in the context of the language?

MR. ROBERTS: Ah, (pause) I don't be—

JUDGE RUSSELL: He was sending this out to Judge Thompson as if Judge Anderson had made a specific finding of a fact but he didn't add the qualifying word "perhaps." Now, that was a very significant act, to my way of thinking.

MR. ROBERTS: If Your Honor please, in the fourth line, he says that, "Perhaps perjury and the systematic destruction of documents," that's in the fourth line, which I think is a direct quote.

JUDGE WILLIAMS: I think what Judge Russell is referring to is the fact that he omitted the underlining of the "perhaps" to place the emphasis on the other words—

MR. ROBERTS: I'm sorry if that—

JUDGE WILLIAMS: —and isn't that a significant omission if you're going to be emphasizing the other language?

MR. ROBERTS: That could be so construed. I don't (pause)—. Let me—let me go back to what had been going on. We had this exchange of correspondence that was going on and if anything is evident in this case, it is certainly evident that what happened in Detroit several days before this was nothing less than an ambush.

JUDGE HAMILTON: You know, this whole proceeding has been filled with words like "ambush, firebabies, and

virgin mules." This reminds me (pause) of a rock soap opera. I've never seen a proceeding that is so undignified in a Federal Court, or in any court, as far as that goes, as this proceeding.

MR. ROBERTS: All right, I know that the term "firebabies" originally—

JUDGE HAMILTON: And you stand there as a member of a distinguished Bar and you wonder why the public rates lawyers the lowest group of people that they have confidence in or respect for and this is exactly one of the reasons why, Mr. Roberts.

MR. ROBERTS: Well, Your Honor, what was done in Detroit, however it might be characterized, put this man in a position where he knew that these depositions that have been cut off out there had taken place. He did not know—

JUDGE HAMILTON: Excuse me—excuse me for interrupting you. You keep wanting to get to the merits. Are we really concerned with the merits of this underlying litigation?

MR. ROBERTS: You shouldn't be concerned with the merits of the litigation itself, no,—

JUDGE HAMILTON: Well, isn't this what you're going—

MR. ROBERTS: —but I'm trying to give you the—

JUDGE HAMILTON: —isn't this what you're going into is part of the discovery—

MR. ROBERTS: No, I'm giving you—

JUDGE HAMILTON: —in the underlying litigation? How are we concerned with that?

MR. ROBERTS: No, sir. I'm endeavoring to give you the state of mind of Jim Butler when he got to his office on Monday morning and didn't know about the order that Judge Hayden had entered which, again, based on a *de novo* approach, reconsideration by Judge Hayden himself, he determined to permit the taking of deposition of the lawyers concerning this thing called the Regional Council, ah, (pause)—

JUDGE HAMILTON: Why don't you go on and say it? For firebabies.

MR. ROBERTS: That's a term that was given to it by General Motors, Judge Hamilton. That's where the name originated. Let me—let's go—

JUDGE WILLIAMS: But does that excuse his behavior to write the letter? I mean if you find that that is a violation of this Court's order, can you take that as an excuse because there's been contentiousness that he didn't get an order from another Judge in another case in a right time and so, therefore, I'm going to slap back at this and I'm going to put in here Judge Ross Anderson's letter? I mean I've got two boys that are ten and 11 and it's about like the two of them, you know, slapping back at each other all the time.

MR. ROBERTS: I agree this is the best advice that was ever given to these parties was probably that given by Judge Thompson on September the 8th when he said, "Get on with the case and stop this stuff." But his letter, the August 30 letter, does more than simply reference that language from Judge Anderson's recusal order. Right after stating that he's enclosing a full copy of it, he points out in the very next

paragraph that in recusing himself, Judge Anderson vacated several of the discovery orders including the order directing that GM's firebabies, including Ms. Vawter (?) be deposed, which was (pause)—basically, it didn't say that this Court, the Fourth Circuit, has stricken and said it should not be cited as authority but it points out that the very orders themselves, if he were relying on some order as a citation of authority, he points out that they've been vacated. Additionally, he points out that he had just learned yesterday, which was the 29th of August, that on August 22nd, Judge Hayden had reinstated several of those orders including that particular one.

JUDGE HAMILTON: Is that a true statement?

MR. ROBERTS: Yes, that is true.

JUDGE HAMILTON: Judge Hayden—when you say reinstated an order—you're speaking about an order in its entirety?

MR. ROBERTS: No. No.

JUDGE HAMILTON: Does he say he has reinstated a portion of those orders?

MR. ROBERTS: He says in his letter—

JUDGE HAMILTON: He's reinstated several of Judge Anderson's prior orders. I've got Judge Hayden's orders here and I defy you to show me where he says he has reinstated any order of Judge Anderson.

MR. ROBERTS: I'm saying that the letter says—

JUDGE HAMILTON: I've got the letter.

MR. ROBERTS: —that Judge Hayden had reinstated the orders, several of the orders, specifically the one permitting the deposing of GM counsel.

JUDGE HAMILTON: That was a portion of an order, was it not?

MR. ROBERTS: Yes, sir.

JUDGE HAMILTON: That was not an order in its entirety?

MR. ROBERTS: That—he did not, ah—

JUDGE HAMILTON: Has any one of Judge Anderson's orders which he himself vacated, the four orders dated December 30th, 1993, has any one of those orders been reinstated by Judge Hayden in its entirety?

MR. ROBERTS: I do not believe that (pause)—he did not—Judge Hayden, in his order—a copy of which, incidentally, was attached to the letter to Judge Thompson—does not say, "I hereby reinstate each of the orders."

JUDGE HAMILTON: Well, let me tell you exactly what his order says because I've got it here, too.

MR. ROBERTS: Yes, sir.

JUDGE HAMILTON: After going through the issue about the deposition of adverse counsel, the computer research discovery, the other portions of it and giving his certain rulings on that, Judge Hayden says in conclusion (pause)—the fruit is logged there also (?)—he says in conclusion, "Based on the foregoing, plaintiff's motion to reinstate the vacated

orders of Judge Anderson is granted insofar and only insofar as the pending motions are consistent with and addressed within this memorandum opinion and order."

MR. ROBERTS: That's correct.

JUDGE HAMILTON: Now, is that the reinstatement of Judge Anderson's order, any one order?

MR. ROBERTS: Not as I would view the term "reinstatement," but I would recall that a copy of the order itself was attached to the letter that went to Judge Thompson.

JUDGE RUSSELL: Well, this again is (pause)—

JUDGE HAMILTON: Mr. Roberts, isn't this somewhat misleading to the Court? (pause) The Court has a right to rely on what an officer of the Court tells it. It shouldn't have to go read the order to see if the order is consistent with what is being represented to it by the officer of the Court.

MR. ROBERTS: Well, it uses the word "reinstated." I cannot avoid that result in there.

JUDGE HAMILTON: It says "the orders;" "Certain of—

MR. ROBERTS: "Certain of the orders."

JUDGE HAMILTON: —Judge Anderson's orders were reinstated.

MR. ROBERTS: Yes, sir.

JUDGE HAMILTON: And I'll ask you again, based on our colloquy, is that a correct statement?

MR. ROBERTS: That is not a correct statement without further qualification, no, sir.

JUDGE HAMILTON: Well, isn't this typical of what Mr. Butler has done throughout this matter? Isn't this typical of what he's doing with this Court?

MR. ROBERTS: I don't believe so, Your Honor. (pause) If Mr. Butler (pause)—if it were his purpose to cite as authority these words, then why would he not do it between March 23rd and September 2nd of this year? Twelve opportunities in cases that he's handling against General Motors with the very same issue involved. He's filed briefs in every one of those issues—in every one of those cases without making any reference to this at all. No reference to it. And his—

JUDGE RUSSELL: Did Mr. Butler submit to anybody else other than to Judge Thompson this order of Judge Anderson?

MR. ROBERTS: In any of the cases that he's handling, Judge Russell, the answer is no. I don't know—

JUDGE RUSSELL: I'm referring to the order, the order of Judge Anderson now. Did he ever submit that order to anybody else other than to Judge Thompson?

MR. ROBERTS: Well, there is a case and it's referenced in a footnote in GM's opening papers and referenced in the body of the argument of our response, Judge Russell, that in the I think it's called the *Corporal* (? spelling) case. Another member of his firm was dealing with another point that had been covered by Judge Anderson's initial order and which was not stricken, was not vacated, and the—

JUDGE RUSSELL: What was that point?

MR. ROBERTS: That point, Your Honor, was whether or not there was a requirement for a full disclosure of privilege logs that the General Motors had that they had developed internally, these logs of privileged materials, and Judge Anderson had ruled on that one and that was not vacated and that was not the subject of this Court's striking action. Now, that was referenced in the *Corporal* case, golly, some five months before this motion for show cause was entered. There's no squawking about that. And there was nothing wrong with that. Indeed, it didn't—

JUDGE RUSSELL: But it wasn't called to the Court's attention, was it?

MR. ROBERTS: No, sir, and it didn't even touch—

JUDGE RUSSELL: So, therefore, we didn't have any occasion to consider it. This, however, originated and we could look back into prior actions to see—to judge what was the meaning of what someone did, can we not?

MR. ROBERTS: You can—I think that any Court can look at inferences that may be drawn. This Court has also got to bear in mind that civil contempt must be proved by clear and convincing evidence. But you look at all the evidence that you have before you with knowing that that's the standard of proof.

JUDGE RUSSELL: You don't think Mr. Butler's response where he made all of these statements that I referred to a moment ago about an error in judgment and a mistake and so forth, you don't think that's an outright admission?

MR. ROBERTS: Yes, that's an admission that that is

how he—

JUDGE RUSSELL: That's a little bit more than clear and convincing, isn't it?

MR. ROBERTS: That is clear and convincing evidence of his state of mind and his belief that he was wrong and in error.

JUDGE HAMILTON: Well, in response to Judge Russell's question, let me ask you this. Who were the four carbon copy addressees of Mr. Butler's August 30 letter to Judge Thompson?

MR. ROBERTS: To an associate of his and members of the law firm representing General Motors so that they would be—

JUDGE HAMILTON: So no one outside of the *Mosely* case?

MR. ROBERTS: No one outside, Judge Hamilton. If I may quickly address this one issue of what civil contempt is, I'd appreciate it. Under *Bagwell*, it is abundantly clear that civil contempt is that contempt which deals with two things: either coercing an individual to do something that they have been ordered to do and have not done. Now that is something that the individual can avoid by their conduct. That's one basis for civil contempt. Another is to compensate someone in damages for what they have suffered by way of damage as a result of the act. Now, criminal contempt, on the other hand,—

JUDGE RUSSELL: Let me ask you this on the civil. Do you mean a Court does not have a right if a member of its Bar makes a misstatement about its opinion, does not have any

power—

MR. ROBERTS: No, sir, I'm not—

JUDGE RUSSELL: —to take—

JUDGE WILLIAMS: Why doesn't this Court have the power to order a retraction?

JUDGE RUSSELL: Yeah.

MR. ROBERTS: You—you do have the power over the attorneys, but civil contempt, whether it be against an attorney or anyone,—

JUDGE WILLIAMS: Why isn't it then a civil contempt order ordering a retraction in compliance with the early order, why isn't that a civil contempt sanction?

MR. ROBERTS: Ah, it simply is not, Judge Williams, because the remedies available under civil contempt have to be either to coerce an action that—

JUDGE HAMILTON: Coerce compliance with this Court's order.

MR. ROBERTS: To coerce compliance.

JUDGE HAMILTON: With this Court's order.

MR. ROBERTS: You can say, "I hereby—

JUDGE WILLIAMS: Give him a $10,000 a day fine to get retraction in.

MR. ROBERTS: If you go to $1,000 fine a day, you are

in the area of criminal contempt.

JUDGE HAMILTON: You've mentioned that several times. Would you rather have this in the area of criminal contempt?

MR. ROBERTS: No, sir. No, sir. I wanted to make sure what I was trying—

JUDGE HAMILTON: I want to make sure I understand you.

MR. ROBERTS: —when I got on my feet.

JUDGE HAMILTON: You're not asking that we refer this for—

MR. ROBERTS: No, sir, I'm not, Judge Hamilton, but I can't avoid telling you about the decision in the *Bagwell* case which is—

JUDGE HAMILTON: Well, why don't you just assume that we know the difference between civil and criminal contempt?

MR. ROBERTS: All right, I shall, but I just—it does not fit. It's as simple as that. Can you direct him to file an apology, to make a correction in the record? Yes, you may do that. You have absolute power to do that.

JUDGE HAMILTON: And we have, also, the power to impose costs, do we not?

MR. ROBERTS: Ah, I expect you do, Your Honor. I have not given any specific consideration to it, but I expect that power exists. Thank you, Your Honors.

JUDGE RUSSELL: All right, sir. Thank you, sir. All right, Mr. Starr, anything in reply?

MR. STARR: Very briefly, if the Court pleases, several points. This case is about honor and integrity and what officers of the Court should do, and it's about an accounting. It's about responsibility for the actions taken by someone who would hold the mantle, a sacred trust, called "officer of the Court." It means an attitude of respectfulness for courts. It means a willingness to obey courts even if you disagree with them. If you disagree with them, you say so respectfully to the court or to a higher court. That's what our system was that we inherited from the Mother Country and that we have built upon and that we take the ancient oath as officers of the court to uphold the dignity of the court. That's what this case is all about. I do not want to belabor the pettifogging distinctions between criminal and civil contempt. We're here about integrity. We're here because this Court's integrity has been violated. Its honor has been violated and so has General Motors. I cannot speak to the Court's integrity; only the Court can speak to that. I can speak to General Motors' integrity. This company has been calumnied time and time again by this plaintiff's lawyer with no foundation in fact. He has now stepped over the line. Now, what should he be called upon to account for? To the Court? Only the Court can speak. But General Motors has been damaged. The Court quite properly put the question to Mr. Roberts, "General Motors has not been damaged?" By that kind of calumny? But let me be more specific. I won't talk about the reputation of engineers, hard-working people with their families, and we're going to try this case against Mr. Butler, in *Cameron* and in *Mosely*, we're looking forward to that trial, but that's, as Judge Hamilton said, that's the merits. What about injury to General Motors? What happened in Judge Thompson's Courtroom is very, very important. Not only did he not correct the record and, obviously, the Court has the

record, the power to direct him to correct the record. He compounded his error by his letter of September 2nd in response to the letter of the former President of the American College of Trial Lawyers, Frank Jones, of King and Spalding. He says in footnote one of his, Mr. Butler's letter, of September 2nd, "I don't recall of any new evidence adduced after entry of Judge Anderson's order." There he goes again. He did it again. Did he cite in another case? Mr. Roberts—I respect Mr. Roberts. He's a distinguished member of the Bar. He may simply be unaware of the fact that he has, Mr. Butler, his client, has submitted that order to another court and we can supplement the record if there's any doubt with respect to that but in the *Conkle* case, he submitted an order, a copy of the order of Judge Anderson. The integrity of General Motors' counsel has been attacked here at this podium with respect to the inflammatory word "ambush." Even Mr. Roberts does not say that that complaint was taken to Judge Hayden and Judge Hayden rejected it in a written order that is now in the record of these proceedings. We didn't hear that even this morning. The Detroit gambit—that's the extenuating circumstances. "I was ambushed in Detroit." I think that is poppycock! And what I do know is that he took that message to both the Bishop Court in Oklahoma and he took that message to Judge Hayden in *Cameron* and both found no violation and, indeed, they said, "General Motors is acting quite properly under the Federal Rules of Civil Procedure to seek a protective order within that jurisdiction."

JUDGE WILLIAMS: Well, I don't think we entered that but I think everybody would agree that this has been contentious by the lawyers also on General Motors' side. It hasn't been contumacious of this Court's order and I don't have any idea of what it's done in all the others but from the volumes of and the reams of paper that I have read, it has been a very contentious and a very hard-fought battle. So I mean all's fair in love and war and, you know, some of that,

but there is contentiousness on both sides.

MR. STARR: Judge Williams, I cannot dispute that. I wish the yellow light weren't on. But to say one thing about General Motors and its outside counsel, the former Attorney General of the United States, Judge Bell, as recently as last week had to tell Judge Thompson who orders the attorney depositions of Chilton Davis Farner (? spelling) and others, a partner at King and Spalding, a hard-working lawyer, an honest lawyer of integrity, "I will not, Judge Thompson, allow her to sit for this deposition." In a fair world, yes, we would have the prudence and graciousness and intelligence of a Judge Hayden guiding all of these cases. I think if Judge Hayden were in charge of all of these attorney depositions for all of the litigation across the country, the contumacious activity would stop very quickly but so would a lot of the contentiousness. But when the former Attorney General has to stand before Judge Thompson in Atlanta and say, "I am willing to (pause)—I may have to be very disobedient of the Court's order because what was the predicate?" And this is the damage, the final point I'll make if we're saying just a word about relief, the damage to General Motors. Judge Thompson ordered these attorney depositions and rode roughshod over the privilege with respect to highly sensitive General Motors documents with not a thing in the record before him except the August 30th letter. There was no predicate, no foundation for taking the deposition of Chilton Davis Farner. Why isn't Mr. Butler willing to take those depositions under the auspices of Judge Hayden in South Carolina? Why? I think that's a fair question. I also think it's a fair question to Mr. Butler, "With whom else have you shared this order in any proceeding?" And I think part of the relief should be for Mr. Butler to certify for the Court to whom, to what institutions and entities he has shared this order including administrative agencies. Moreover in terms of the appropriate relief, if he wants to elevate this to a

criminal proceeding, we're prepared to submit something in that respect. For the final thing is we're talking about the honor of General Motors. He should be required not just to set the record straight. Judge Russell, other members of this distinguished Court, he should be required to write a letter of apology to General Motors, to its shareholders, to its employees, namely, the Chairman of the Board of General Motors and, thirdly, he should be required to write a letter of apology to General Motors' outside counsel. I would urge the Court, finally, to broaden the order so that there is no more pettifogging with respect to whether I cited that as authority. We know as lawyers what it means to cite as authority; he did. I would also urge that General Motors, in terms of its damage, be reimbursed for its expenses in this proceedings, costs and fees. I thank the Court.

MR. ROBERTS: May I, Your Honor, bring to the attention of the Court an error in one of our filings—

JUDGE RUSSELL: An error in what?

MR. ROBERTS: In one of our filings, simply so you don't misread it. It's just one word. The filing that we made day before yesterday, our response to the motion of General Motors for leave to submit additional documentary evidence. On page four of that, we were citing from the transcript of the colloquy that took place between Griffin Bell and Judge Thompson in the *Mosely* case on October 13. That's the one that was just referenced by Mr. Starr. On page four, the last statement made by Mr. Bell says, "I'm not going to ignore it, I'm not going to stand for contempt," is a typographical error. He said, "I am going to stand for contempt," and not—and he did not say, "I am not going to." It was just a typographical error. The transcript is attached. (pause)

JUDGE RUSSELL: I don't realize what that's all about

as far as with respect to this case. (pause to refer to papers) There's a little bit of difference about the language there the way you sort of shift it I'm afraid a little bit, but I don't think that's important to the issue right now.

MR. ROBERTS: I simply wanted you to know that I thought that we incorrectly stated what was in the transcript.

JUDGE RUSSELL: All right, anything further?

MR. ROBERTS: No, Your Honor.

JUDGE RUSSELL: If not, the Court stands adjourned.

HEARING CONCLUDED.

APPENDIX F

FILED: September 6, 1995

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 94-1011
(CA-93-1280-6-3)

In Re: GENERAL MOTORS CORPORATION,
a Delaware Corporation,

Petitioner,

ORDER

On Petition for Rehearing with Suggestion
for Rehearing In Banc

The respondent's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc,

And as the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and

suggestion for rehearing in banc are denied.

The respondent also filed an unopposed motion for an extension of time to file a petition for rehearing and a request for expedited consideration of the motion. In light of this Court's denial of the petition for rehearing with suggestion for rehearing in banc, the motion and request are denied as moot.

Entered at the direction of Judges Russell with the concurrence of Judge Hamilton and Judge Williams.

For the Court

/s/ Bert M. Montague
Clerk

APPENDIX G

FILED: September 11, 1995

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 94-1011

ORDER

In Re: General Motors Corporation

By order of this Court dated August 8, 1995, a panel consisting of Judge Russell, Judge Hamilton, and Judge Williams found the respondent James Butler in contempt of our order of March 23, 1994, in this proceeding. Having done that, we declared that the petitioner General Motors was "entitled to be compensated for its expenses relating to correcting the effects of Butler's misconduct in the Georgia State Court and the United States District Court for the District of Kansas" as well as "reasonable costs and attorney's fees for the contempt proceedings before this Court."

The petitioner General Motors has filed a statement of its charges pursuant to the above ruling, and the respondent has indicated his intention to contest such charges. In that connection, the respondent Butler has requested a more complete justification for the charges asserted by General Motors and, assuming the motion is approved by the panel, a reasonable opportunity to respond to the charges after being furnished General Motors' justification of such charges.

After due consideration, we do hereby refer the petition

of General Motors for review and determination of the proper amount to be assessed against the respondent Butler under the contempt decision ordered by us herein to United States District Judge Robert G. Doumar of the Eastern District of Virginia, with all the power and prerogative incident to such assignment.

The motion of the respondent for extension of time for responding to the petition of the petitioner General Motors for the assessment of proper charges against the respondent Butler is also referred for decision by Judge Doumar. In the meantime, the time for filing his objections to the charges by the respondent Butler is extended from September 7, 1995, with authority in Judge Doumar to fix the time for filing Butler's response to General Motors' proposed charges herein.

The suggestion of the respondent Butler that the petition for rehearing herein be consolidated with the present petition for the assessment charges has already been mooted by our order denying rehearing herein.

With the concurrence of Judge Hamilton and Judge Williams,

/s/ Donald Russell
U.S. Circuit Judge Donald Russell

APPENDIX H

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

December 1, 1995

Mr. Peter J. Nickles
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, DC 20004

Re: James E. Butler, Jr.
v. General Motors Corporation
Application No. A-459

Dear Mr. Nickles:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to the Chief Justice, who on December 1, 1995, denied the application.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk

By

/s/
Melissa A. Blalock
Assistant Clerk

NOTIFICATION LIST

Mr. Peter J. Nickles
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, DC 20004

Mr. Kenneth W. Starr
Kirkland & Ellis
655 15th Street, N.w.
Washington, DC 20005

Mr. Stephen G. Morrison
Nelson, Mullins, et al.
Lady Street, Fl. 3
Columbia, SC 29201

APPENDIX I

August 30, 1994

Honorable Albert L. Thompson
Judge, Fulton State Court
T3955 Justice Center Tower
185 Central Avenue, S.W.
Atlanta, GA 30303

RE: Moseley v. General Motors

Dear Judge Thompson:

We have Ms. Varner's August 26 letter to you. Curiously, we were with Ms. Varner in Detroit on August 26, the very day she supposedly signed this "hand delivery" letter to you, and on the two days previously. We were in Detroit taking depositions of GM litigation consultants and engineers in another pickup truck fire case, *Bishop v. General Motors*, which is pending in federal court in Muskogee, Oklahoma. On that day, August 25, Ms. Varner and other GM counsel attempted to force plaintiffs in *Bishop* and in *Moseley* and in other cases to litigate a crucial issue pending before the judges assigned to each of those cases in GM's backyard with a Detroit judge. The issue was GM's apparent destruction and/or concealment of evidence from plaintiffs in cases such as *Moseley*.

Much has happened since the *Moseley* verdict, and Ms. Varner's letter requires that we bring the Court up to date, as events since the verdict are pertinent both to the additional work required to be done in *Moseley* in order to comply with the Court of Appeals' opinion and pertinent to the misrepresentations Ms. Varner makes in her August 26 letter.

Plaintiffs noticed the depositions of six GM witnesses in the *Bishop* case on dates offered up by GM counsel in *Bishop*. GM counsel in *Bishop* and other cases then insisted that each of the six depositions be styled in some other cases we are handling, and that three of the six depositions also be styled in *Moseley*. We couldn't figure out why GM would insist on that. We objected to it. We noted that the law in each state would govern whether the depositions could be used in other cases (and the law of Georgia is quite clear that such depositions could be used in *Moseley*), but we refused to agree that each deposition be styled in cases other than that case for which we noticed the deposition.

During the three depositions which occurred on Wednesday and Friday, we asked questions about possible destruction and concealment of evidence as a result of GM's Regional Counsel Project in the early '80s. A digression to explain the Regional Counsel Project is required:

The Regional Counsel Project was an attempt by GM to have its legal staff and outside lawyers from its Regional Counsel firms[1/] locate, retrieve, review, organize, and prepare forms describing every document possessed by GM engineers pertinent to fuel systems and fuel fed fire cases.[2/] A group of young lawyers were assembled who spent years in

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[1/] King & Spalding has long been one of GM's Regional Counsel firms.

[2/] One of the things we've discovered during our continuing investigation since the *Moseley* verdict is something we knew had to be true, but could not prove before: When GM responds to a plaintiff's discovery or a court order, it does *not* look for documents where those documents are to be found. Instead, it has an elaborate procedure set up so that it can appear to look for such documents without actually finding those that are most damaging. More will be developed on this subject in the future.

the basements of five GM buildings in Detroit reviewing such documents and preparing forms describing what was in the documents and, we suspect, analyzing whether production of the documents to plaintiffs would be damaging. These young lawyers called themselves the "firebabies." Three King and Spalding associates participated in at least some aspects of the firebabies' activities, including Ms. Varner (whose involvement was apparently very prominent, judging from privilege logs which a federal judge in South Carolina has required be produced by GM of legal staff documents withheld from discovery).

U. S. District Judge G. Ross Anderson of South Carolina, in another GM pickup truck case styled *Cameron v. General Motors*, ordered that GM provide discovery about the firebabies' activities, and that the firebabies, including Ms. Varner, be deposed by plaintiffs. Judge Anderson also ordered that the firebabies' forms be produced to him in camera for his evaluation of GM's privilege claims. GM refused to produce the firebabies' forms, and then refused to answer any questions by plaintiffs about what happened to those forms. GM then filed a motion to recuse Judge Anderson, who did recuse himself, after finding as follows:

> A review of the thousands of documents in this case including in camera reviews of documents for which an attorney-client privilege was asserted reveals *a substantial likelihood* that perhaps *perjury and the systematic destruction of documents* involving gross misconduct by General Motors' regional counsel occurred. Evidence of the commission of such activity by and with the knowledge of these General Motors' regional counsel would defeat the attorney-client and work product privilege asserted by General Motors. There is clearly evidence having a sufficient foundation in fact to establish a prima facie case that the documents for which an

> attorney-client privilege is asserted are subject to the crime fraud exception [to the attorney-client privilege].

Order of Judge G. Ross Anderson, February 24, 1994 (copy enclosed).

In recusing himself, Judge Anderson vacated several of his discovery orders, including that order directing that GM's firebabies, including Ms. Varner, be deposed. (Copies of the vacated orders are also enclosed.) The United States Court of Appeals for the Fourth Circuit then appointed another federal judge to preside over the *Cameron* case, this one from West Virginia, Honorable Charles H. Haden II. Plaintiffs Cameron and GM then rebriefed, extensively,[3/] the same issues which had been covered by Judge Anderson's orders. Just yesterday we learned that on August 22, Judge Haden reinstated several of Judge Anderson's prior orders, specifically including the order directing that GM's outside counsel (the firebabies) be deposed. (A copy of Judge Haden's order is enclosed).[4/]

[3/] The briefs ran, quite literally, to some hundreds of pages, with stacks of exhibits.

[4/] The only order previously entered by Judge Anderson not reinstated by Judge Haden dealt with GM's privilege claims. Judge Haden indicated in his order that he would review the documents subject to those privilege claims and issue an order specific to that subject. The two federal judges in *Cameron* have dealt not only with privilege claims made with respect to Elwell documents, but also with privilege claims asserted with respect to documents GM has put in its legal staff files in an attempt to create the appearance of privilege. The federal judges in the *Cameron* case have reviewed only those documents claimed by GM to be privileged which plaintiffs specifically asked be reviewed, based on the information contained in GM's privilege logs. Regrettably, plaintiffs' investigation has revealed that more documents need to be reviewed. For example, in responding to various court orders to provide plaintiffs with privilege logs,

(continued...)

One of GM's objections to our request to depose the firebabies had been that we should first attempt "less intrusive" means of obtaining information on that subject, such as deposing "non-lawyers." Nevertheless, when during the three *Bishop* case depositions on last Wednesday and Thursday, we asked about the firebabies' (using that as a shorthand for the Regional Counsel Project) activities, GM counsel instructed those three witnesses not to answer the questions.

On Friday morning, we started the deposition of GM expert and litigation consultant William Cichowski.[5/] We knew Cichowski had been intimately involved in the firebabies' project, and that the next witness to be deposed Friday afternoon—Mr. Coffey—had also been involved. That morning, for the first time during the three days of depositions, lead counsel for GM in the *Cameron* case and Kansas counsel for GM in another federal court case (*Cockrum v. General Motors*) showed up, so that counsel for GM in four different cases were present, even though we had noticed the depositions in only one case. We thought that

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[4/](...continued)
GM has changed the description of many documents which it has withheld, in an obvious attempt to make the documents appear privileged. For example, the description given Elwell documents in the privilege log produced in *Moseley* differs considerably from the description of the same documents in the privilege log produced in *Cameron*.

[5/] The Court may recall him from the first hearing had in *Moseley*: Cichowski testified on March 7, 1991 that our discovery should be restricted to pickups produced in 1984-1987. Your honor rejected that proposed restriction by GM, which allowed us to discovery, for the first time in the history of pickup truck litigation (by that time there had been over 100 cases similar to *Moseley*), the entire history of the pickup, which was manufactured from 1972-1987. Cichowski's evidentiary videotape deposition was also 'played' during the *Moseley* trial.

odd. We learned why when we asked Mr. Cichowski "are you familiar with the term firebabies?" GM counsel instructed the witness not to answer, and instructed me that I could not even *ask* questions about that subject, that the depositions of Cichowski and Coffey could proceed only if I agreed not to ask any questions about that subject, and that if I declined to so agree, GM was going to file a motion and have a hearing that day with a Detroit judge. We declined either option, and returned to Georgia.

The Court should understand that the issue of what discovery plaintiffs might obtain about the 'firebabies' issue was and is pending before Judge Haden in the *Cameron* case, was and is pending before Judge BElow in the *Cockrum* case, was and is pending before Judge Seay in the *Bishop* case, and was about to become pending before your honor in *Moseley*, as we had written to the Court and to Ms. Varner of the need to replace the Kashmerick testimony with more complete testimony of witnesses whom GM would have full "opportunity" to examine. GM's gambit was calculated to make an 'end run' around each of those courts in which the issue was pending, and to obtain a ruling from a detroit judge (who would presumably be wholly unaware of the issue which had been briefed so thoroughly in these other cases) supposedly defining the scope of discovery in *Bishop*, *Cameron*, *Cockrum*, and *Moseley*. *That* is why GM wanted the depositions styled in each of those cases, and specifically wanted the Cichowski deposition styled in the *Moseley* case, and that is why regional counsel for GM handling each of those cases showed up Friday morning. GM had obviously been planning that gambit for quite some time.

Obviously, GM knew about Judge Haden's August 22

order, even though we did not.[6/] GM's intent was clear: To evade Judge Haden's order prescribing the scope of discovery about the 'firebabies' issue and obtain a contrary order from a Detroit judge

That brings us to the letter of August 26 authored by a lawyer whom two federal judges have now ordered should be deposed with respect to "the substantial likelihood that perhaps perjury and the systematic destruction of documents involving gross misconduct by General Motors regional counsel."

Ms. Varner's letter is incorrect.

1. Ms. Varner asserts that no privilege issues remain pending before the Court, and cites to the post-trial motions hearing for that proposition. That makes no sense to us. Ms. Varner states that because we did not appeal from the Court's order on post-trial hearings, "the issue" of GM's privilege claims "is therefore closed." That makes no sense at all (my distinct recollection is that plaintiffs "won" on those post-trial motions). Ms. Varner represents that "each time" this issue was briefed and argued "your honor ... agreed that GM's provision of the privilege index fulfilled its obligations under the Court's directives and that GM did not 'violate' any court order." That representation is directly contrary to the Record.

The Court will recall that for the second deposition of Ronald Elwell, taken in August 1991, GM subpoenaed all documents then held by the witness relating to certain subjects. When the deposition commenced, Mr. Elwell produced those documents. Counsel for both parties began

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6/ Inexplicably, our office never received a copy of Judge Haden's order until late Friday, apparently when we were en route back to Georgia from the cancelled depositions.

reviewing them. Then GM counsel objected to any review of the subpoenaed documents by plaintiffs' counsel, and engaged Chief Judge Carnes in a telephone hearing. (Your honor was unavailable at the time). Subsequently, Judge Carnes entered a written order prepared by GM counsel. That order required that GM review the Elwell documents, produce to plaintiffs all those for which no privilege claim was asserted, and submit the supposedly privileged documents to Your Honor for decision of the privilege claims. GM produced nothing to the Court. Then, on December 17, 1992, the Court once more, for the third time, directed that GM produce to the Court any Elwell documents as to which a privilege claims was made. GM produced nothing to the Court.

On January 5, 1993, after the *Moseley* trial had commenced, the issue of Elwell documents was raised once more by GM's motion to exclude a study authored by Elwell in 1972 (which we had obtained on our own). What transpired thereafter should be well-remembered by Ms. Varner. It is surely etched on my brain:

> The Court: Well, while we're speaking of that, GM never produced to me the documents that I requested for determination of privilege.
>
> Ms. Varner: Judge, we offered to make those available—
>
> The Court: Well, offered—I directed you to produce them before Christmas and they haven't been produced.
>
> Ms. Varner: Excuse me, Judge, I don't—
>
> The Court: No. You stood up and said that you brought—that you had provided an index and you had and then I subsequently ordered you to produce them and you didn't do it.

Ms. Varner: Judge Thompson—

The Court: This is part of GM's not being forthcoming with this Court. Now, I ordered those documents produced and I intend for you to do it.

Ms. Varner: I'll be happy to provide the documents to your honor.

The Court: Yes, you will.

Ms. Varner: It—

The Court: I'm glad you mentioned it because that's another bit of sand in my craw. You haven't produced them, and I ordered you to do it.

Ms. Varner: Judge, I apologize. There is nothing in the order that requires us to bring them down here but they can be made available later today.

The Court: My law clerk contacted both sides and ordered you to produce these documents. I already had the index and I ordered you to produce the documents. I sent word for them to be brought to the courthouse and they were not.

Moseley Transcript, January 5, 1993, pp. 23-25.

Obviously, the Court had no opportunity during the trial to review the Elwell documents which GM had withheld from discovery and from the Court in violation of three separate orders. Plaintiffs were confronted with the dilemma always intended by GM when it violates the law and court orders and delays production of evidence—continue the trial or simply do

without.[7/] That left us no choice at the first trial—we did without. We now have a second trial, and the Court has the documents, and the question whether GM may withhold those documents from discovery remains before the Court.[8/]

2. Ms. Varner continues to state that plaintiffs "are seeking additional discovery", despite our repeatedly telling her we are not. She cites the fact we took the depositions of Stepp, Kendro, and Cichowski (taken in the *Bishop* case) as proof we are seeking new discovery, despite her knowledge that we expressly *rejected* GM's attempt to style those depositions in the *Moseley* case, and despite the fact those

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7/ GM attempted to place plaintiffs in the same dilemma with its false claims made in december 1992 of having then obtained new counsel and conducted new tests and found new evidence. Plaintiffs had to object to that late creation of new "defenses", and if that objection were not sustained, would have had to request a continuance to conduct discovery about the new "defenses" and to formulate a response. The Court, however, sustained the objection. GM enumerated that ruling as error on appeal. The Court of Appeals did *not* agree with GM about that enumeration. Now GM is attempting to reopen discovery so it can subvert that December 1992 ruling and thus put plaintiffs on the horns of a dilemma once more by requiring that plaintiffs delay the re-trial of this case so they can find out what "new evidence" GM is hiding this time. The Court will note, from the correspondence provided by Ms. Varner with her letter, that GM *refuses* to disclose the "new evidence" which causes GM to think additional discovery is needed.

8/ Such "privilege" issues have also been considered by Judge Anderson in the *Cameron* case, and are currently being reconsidered by Judge Haden in the *Cameron* case. Judge Anderson found many of GM's privilege claims to be baseless, and suggested that Rule 11 sanctions should be investigated based on GM's making of such claims. Plaintiffs' continuing investigation, after the *Moseley* verdict, of GM's pickup trucks and GM's destruction or concealment of evidence has resulted in much more being known about the extent to which GM abuses "privilege" claims to withhold evidence. The only privilege issue currently still pending before this Court in *Moseley*, however, relates to the Elwell documents.

depositions were expressly taken for use at trial, as evidentiary depositions, and not for "discovery".[9/] The plaintiffs in the *Bishop* case are entitled to take evidentiary depositions of GM witnesses. The fact they are also represented by us does not convert those *Bishop* evidentiary depositions into "discovery" depositions in *Moseley*.

3. Ms. Varner represents that GM counsel "have offered repeatedly to meet" with us "to see if we can reach agreement as to what is needed for the second trial," etc. That is false. There has been no such "repeated" offering to "meet." What there has been is a repeated failure by GM to disclose what "new evidence" it means and what "new discovery" it supposedly needs.[10/] Plaintiffs have stated what they think needs be done. Simple honesty from GM should result in reciprocity.

[9/] There is a clear distinction between "evidentiary" depositions and "discovery" depositions. We have no choice but to conduct our *trial examinations* of GM witnesses before trial, because those witnesses cannot be compelled to come to trial in Georgia, and GM will not bring them to trial (as seen in the *Moseley* trial itself). The fact we are forced to conduct our trial examinations of GM witnesses before trial commences does not convert those depositions into an attempt by us to do new "discovery," whether the depositions are taken in *Moseley* or in some other case. That is certainly true where the depositions are *not* 'taken' in the *Moseley* case, and that trust is not changed by the fact that, under the law, the depositions may nevertheless be used in the second *Moseley* trial.

[10/] The Court will recall that this kind of games-playing by GM wasted considerable time during the pre-trial litigation in *Moseley* and during the first few days of that trial. GM would not even disclose to us information about new witnesses they professed an intention to call so that we would be able to ask the jurors about those new witnesses. GM delayed providing us with its objections to videotape depositions in an attempt to burden our efforts to edit those videotapes for use at trial. I could go on and on with such a listing of GM's games-playing.

We remain available to meet with anyone representing GM provided they first tell us what we'll be "talking" about, so that we can consider the "issues" and be prepared at such a "meeting" to deal with them intelligently. Alternatively, we look forward to meeting with the Court and to retrying this case.

Sincerely,

BUTLER, WOOTEN, OVERBY & CHEELEY

/s/
James E. Butler, Jr.

JEB:shw
Enclosures
cc: Bob Cheeley
Al Pearson
Lee Tarte
Chilton Varner

Supreme Court, U.S.
FILED
JUL 29 1997
CLERK

(2)

No. 96-1902

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

JAMES E. BUTLER, JR.,
Petitioner,
v.
GENERAL MOTORS CORPORATION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION

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July 29, 1997

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QUESTION PRESENTED

Did the Court of Appeals act properly when it held an attorney in civil contempt after finding that he had violated the specific commands of its unequivocal order, and required him to compensate the opposing party for the expenses germinating from that misconduct as determined by a District Judge after hearing argument from both parties and after painstaking review of the record and the parties' submissions?

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, General Motors Corporation advises the Court that the following is a list of General Motors' non-wholly-owned subsidiaries as reported to the Securities and Exchange Commission in Exhibit 21 to General Motors' Form 10-K Annual Report for the year ended December 31, 1996.

Asset Leasing GMbH
Carus Grundstucks-Vermietungsgesellschaft mbH & Co.
General Motors GmbH & Co. OHG
Opel-Automobilwerk Eisenach-PKW GmbH
Auto Cable Industries (Pty) Limited
Convesco Vehicle Sales GmbH
Contro Toonico Herramental, S.A. de C.V.
Packard Electric Hebi Co., Limited
Packard Electric Bai Cheng Co., Limited
Delphi Italia Automotive Systems S.r.1.
Delphi Italia Service Center S.r.1.
DRB s.a./n.v.
Opel France S.A.
ENCI S.A.R.L.
Texton P.L.C.
Delphi Harrison
Delphi L'EM Argentina S.A.
Reinshagen Tournai S.A.
GM Ovonic L.L.C.
Banque Opel
General Acceptance (Thailand) Ltd.
Holden National Leasing Limited
GM Finance HB
OPEL Leasinggesellschaft mbH
Polbank, S.A.
P.T. GMAC Lippo Finance

RULE 29.6 STATEMENT
(continued)

General Motors de Argentina S.A.
Beijing Wanyuan GM Automotive Electronic Control Co., Ltd.
Hubei Delphi Automotive Generator Co., Ltd.
Saginaw Norinco Lingyun Drive Shaft Co., Ltd.
Zhejiang Delphi Asia-Pacific Brake Co. Ltd.
General Motors Colmotores, S.A.
IBC Vehicles Limited
Millbrook Pension Management Ltd.
DIRECTTV Enterprises, Inc.
IBC Vehicles (Distribution) Limited
GM-Saab Communication GmbH
Packard CTA Pty. Ltd.
Packard Electric Systems Samara Cable Company
PT General Motors Buana Indonesia
P.T. Packard Kabelindo Murni Indonesia
Radiodores Richard, S.A.

In addition, General Motors has recently acquired an interest in PanAmSat Corporation.

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COUNTERSTATEMENT OF THE CASE

This case grew out of a separate products liability action, *Cameron v. General Motors Corp.*, Nos. 6:93-1278-3, 1279-3, 1280-3 (D.S.C.), in which petitioner James E. Butler, Jr., represented plaintiffs who had sued respondent General Motors Corporation ("GM"). The discovery process in *Cameron* was highly contentious. The plaintiffs sought to depose at least twelve current and former GM in-house and outside counsel, and to compel production, among other things, of privileged documents from those attorneys' files. In a series of orders in December 1993, the District Court (G. Ross Anderson, J., D.S.C.) ordered GM to comply with those unprecedented discovery requests. GM immediately filed a petition for mandamus. The Fourth Circuit responded by entering an order staying all proceedings in the District Court pending further review.

In the midst of these discovery disputes, the District Judge in early December 1993 actively participated in a motor vehicle tort conference sponsored by members of the South Carolina plaintiffs' bar. At that conference (which the Judge himself had helped to organize), he repeatedly and publicly denounced motor vehicle tort defendants and was exposed to *ex parte* presentations of evidence and arguments directly relevant to the *Cameron* case by petitioner and other plaintiffs' attorneys involved in that very case. Immediately after the conference, the Judge made hostile remarks to GM's trial counsel and, with no explanation, denied GM time to reply to an important substantive motion.

After carefully studying the transcript of proceedings at the conference and the relevant legal standards, GM filed a recusal motion in January 1994. The Judge not only refused to entertain the motion, but—at a hearing in open court—accused

GM of "scandalizing a federal court" and ordered the company to show cause why its attorneys should not be subjected to Rule 11 sanctions for filing the motion. *See* Tr. of Motions Hearing at 10, *Cameron v. General Motors Corp.*, Nos. 6:93-1278-3, *et al.* (D.S.C. Jan. 25, 1994); Order to Show Cause (Jan. 27, 1994).

GM also furnished a copy of its recusal motion to the Fourth Circuit. On February 18, 1994, the Court of Appeals issued an order lifting its stay of the *Cameron* proceedings "solely to allow the district court to hear and rule upon the issue of recusal." *See* Order at 1, *In re General Motors Corp.*, No. 94-1011 (4th Cir. Feb. 18, 1994) (reproduced as Appendix A). The Fourth Circuit noted that "[t]he claims made by [GM] in its motion and accompanying memorandum, if true, are extremely serious." *Id.* at 1. The Court of Appeals ordered that "the district court shall hear and rule upon the issue of recusal" forthwith and "forward to this Court a copy of its order." *Id.* at 1-2.

On February 28, 1994, the District Judge entered an order recusing himself from further participation in the *Cameron* case, and vacating the five pending discovery orders. The Judge, however, did not stop there. Rather, he issued a *59-page order* that made extensive *new* findings of fact and conclusions of law on the specific issues addressed in the discovery orders that his recusal order obliged him to vacate. *See* Order, *Cameron v. General Motors Corp.*, Nos. 6:93-1278-3, *et al.*, 1994 WL 159408 (D.S.C. Feb. 28, 1994) (reproduced as Appendix B).

In light of the inappropriate and highly prejudicial nature of these new findings of fact and conclusions of law, GM promptly filed a motion asking the Fourth Circuit to strike the offending portions of the recusal order. The Fourth Circuit granted the motion. On March 23, 1994, the Court of Appeals issued an Order holding that it was improper for the District

Judge to make new findings of fact and conclusions of law on the issues addressed in the vacated orders. The Order stated in part:

> [S]ection III of the recusal order, as well as any other statements in the order relating to the possible destruction of documents, perjury by [GM] or [GM]'s counsel, or applicability of the crime-fraud exception of the attorney-client and work-product privileges to the facts of this case, are hereby stricken from the order and should not hereafter be cited as authority. We also strike all findings or conclusions regarding the liability or culpability of [GM]'s counsel with respect to the pending motion for sanctions under Fed. R. Civ. P. 11.

Pet. App. at 101a-102a. In a footnote to this passage, the Court specifically referenced another counsel's citation of the recusal order in a California case as an example of the kind of misconduct that it would not permit. *Id.* at 102a n.1.

Despite the clear terms of this Order, just one week later petitioner cited the stricken findings in a brief filed in a case against GM in federal district court in Kansas, *Cockrum v. General Motors Corp.*, No. 93-1180-MLB (D. Kan.). In particular, petitioner stated that "The Fourth Circuit [in its March 23 Order] did not dispute or otherwise disagree with Judge Anderson's findings . . . in his recusal order" and that Judge Anderson had found "a substantial likelihood that perhaps perjury and the systematic destruction of documents occurred." Pls.' Br. in Opp. to Def. GM's Motion for Protective Order at 14. The brief never stated that Judge Anderson's findings had been stricken by the Fourth Circuit and were not to be cited as authority; rather, the brief asserted that the Fourth Circuit did not consider the evidence relating to those findings, but "simply ruled that such findings had no place within the confines of a recusal order." *Id.*

Several months later, on August 30, 1994, petitioner wrote a letter to the presiding judge in a proceeding against GM in a state court in Georgia, *Moseley v. General Motors Corp.*, No. 90-V-6276 (Sup. Ct., Fulton County, Ga.). Pet. App. at 141a-152a. In that letter, petitioner included a lengthy block quotation from the portion of the recusal order expressly stricken by the Fourth Circuit. *Id.* at 143a-144a. Indeed, petitioner quoted *the very language* that the Fourth Circuit had used in the March 23 Order as an example of the inappropriate findings included in the recusal order. *See id.* Petitioner's letter also stated that "Judge Anderson found many of GM's privilege claims to be baseless, and suggested that Rule 11 sanctions should be investigated based on GM's making of such claims." *Id.* at 150a n.8.[1] The letter omitted any mention of the fact that the Fourth Circuit had stricken the cited portions of Judge Anderson's recusal order and the "findings" relating to the possible Rule 11 liability of GM's trial counsel. To the contrary, petitioner attached to the letter a complete copy of the recusal order.

On September 14, 1994, GM moved in the Fourth Circuit for an order requiring Butler to show cause why he should not be held in contempt for violating the March 23 Order. The Fourth Circuit granted that motion and scheduled a hearing for October 20, 1994. Pet. App. at 103a-104a. At that hearing, counsel for Butler, while not contesting that Butler had cited the stricken language, argued that Butler had not violated the Court's order and that there was no basis for any contempt finding. Pet. App. at 115a.

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[1] In reality, *no other court* has ever agreed with or adopted Butler's allegations about GM's conduct, and *no other court* has ever agreed with or adopted the stricken contentions improperly asserted by Judge Anderson in his recusal order. *See, e.g.*, Alison Frankel, *Debunking the GM Conspiracy Myth*, Am. Law. 87-94 (Nov. 1995) (scrutinizing Butler allegations against GM and finding them to be lacking in proof).

The Fourth Circuit rejected that argument. In August 1995, the court issued its Opinion and Order holding Butler in civil contempt for violating its March 23 Order. Pet. App. at 1a-9a. The Fourth Circuit began by explaining that "[c]ivil contempt is an appropriate sanction if we can point to an order of this Court which 'set[s] forth in specific detail an unequivocal command' which a party has violated." Pet. App. at 5a-6a (quoting *Ferrell v. Pierce*, 785 F.2d 1372, 1378 (7th Cir. 1986)). The court recognized that the complainant bears the burden of proving civil contempt by clear and convincing evidence. *Id.* at 6a (citing *Project B.A.S.I.C. v. Kemp*, 947 F.2d 11, 16 (1st Cir.1991)).

Applying these legal standards, the court concluded that "GM has satisfied its burden of demonstrating by clear and convincing evidence that Butler violated the specific and unequivocal commands of our order of March 23, 1994." *Id.* The March 23 Order, the court explained, "was clear and unequivocal." *Id.* "We struck Part III and other portions of Judge Anderson's recusal order as inappropriate, and expressly ordered that the specified portions of the order were not to 'be cited as authority.'" *Id.* (quoting March 23 Order at 2-3). The Fourth Circuit held that by citing and quoting the stricken recusal order in the *Cockrum* brief and the *Moseley* letter, Butler had clearly violated the terms of the March 23 Order. *See id.* at 7a.

The court then turned to the issue of remedy. The court emphasized that "the remedies and sanctions must be remedial and compensatory and, unlike criminal contempt, nonpunitive." Pet. App. at 7a (citing *United States v. United Mine Workers of Am.*, 330 U.S. 258, 302-04 (1947)). A compensatory sanction, the court explained, "may not exceed the actual loss to the complainant caused by the actions of respondent, lest the contempt fine become punitive in nature, which is not appropriate in a civil contempt proceeding." *Id.* (quotations

omitted). The court noted that "[t]here is no question that GM was injured" by Butler's contumacious conduct—the company was forced to "expen[d] considerable resources to correct or thwart the effects of Butler's blatant misconduct." *Id.* at 7a. Accordingly, the court held, "GM is entitled to be compensated for its expenses germinating from [that] misconduct," and "to reasonable costs and attorney's fees for the contempt proceeding before this court." *Id.* at 8a. The court ordered GM to submit a summary of the relevant expenses and costs within twenty days, and ordered Butler to respond no more than ten days later. *Id.* at 8a-9a.

In December 1995, while this contempt proceeding was pending in the Fourth Circuit, the *Cameron* products liability issues were settled; however, Butler continued to litigate three pending cases in which it had been stipulated that the rulings in *Cameron* and each of the other cases would apply to one another. *See* Pet. App. at 5a n.2. In a supplemental brief, Butler argued that the settlement divested the Fourth Circuit of any authority to continue the ongoing contempt proceedings and to grant GM relief for his violation of the March 23 Order. The court rejected that argument. *Id.* at 8a n.3. The pending contempt proceeding, the court explained, was "compensatory in nature, and in contrast to the situation with contempt proceedings that are coercive in nature, 'the termination of the underlying action out of which the contempt hearing arose does not moot the contempt proceeding.'" *Id.* (quoting *Petroleos Mexicanos v. Crawford Enters., Inc.*, 826 F.2d 392, 400 (5th Cir.1987)). As the court explained, compensatory proceedings differ from coercive proceedings because "the harm or injury that gives rise to the need for compensation continues unredressed at the end of the underlying litigation while the need for getting a party to act in the underlying litigation necessarily terminates when that litigation ends." *Id.* (internal quotation omitted). Because the "harm suffered by

GM—expending considerable resources in other jurisdictions to curb the effect of Butler's blatant misconduct—was unredressed at the time the *Cameron* case was settled," the court held that its compensatory contempt proceeding was not moot. *Id.*

Butler filed an unsuccessful petition for rehearing and rehearing *en banc*. Pet. App. at 135a-136a. Shortly before the expiration of the time to file a petition for certiorari, Butler filed an application for extension of time in which to file such a petition. The Chief Justice denied the application on December 1, 1995, and Butler did not file a petition.

Meanwhile, pursuant to the Fourth Circuit's order, GM filed a summary of costs and expenses in the amount of $212,739.75. GM stated that it was willing to submit more detailed information *in camera* and under seal, inasmuch as that information was protected by the attorney-client privilege and work product doctrine (and would be of particular interest to Butler, who continued to litigate many cases against the company). Butler challenged GM's summary of costs and expenses on both factual and legal grounds, asserting that due process required the company to prove with specificity the fact, amount, and causal nexus of all charges. Absent such proof, Butler argued, the sanction would be unconstitutionally punitive. Accordingly, Butler asked the Fourth Circuit to refer the matter to an appropriate district court for an evidentiary hearing.

By order of September 11, 1995, the Fourth Circuit referred the matter to U.S. District Judge Robert G. Doumar (E.D. Va.) "for review and determination of the proper amount to be assessed against [Butler]." Pet. App. at 138a. That order did not directly address Butler's motion for an evidentiary hearing.

After reviewing an initial round of briefs from the parties, the District Court "decided that each party should be able to hear and respond to the arguments raised by the other," and "therefore ordered the parties to brief the issues according to a briefing schedule set by the Court and, further, to reply to interrogatories developed by the Court to focus on the heart" of the controversy. Pet. App. at 26a. In January 1996, the District Court held oral argument on Butler's motion for an evidentiary hearing. *Id.* at 27a. At that hearing, Butler conceded that the hourly rates charged by GM's outside counsel were reasonable. *Id.* at 27a-28a. The court thereafter ordered GM to submit its bills under seal for Butler's review, *id.* at 28a, and directed Butler to "respond in the form of objections to particular tasks or particular dates, and [to submit] any documentary evidence that Respondent reasonably believe[d could] rebut these charges." Order of March 5, 1996, at 2. Although Butler made numerous general and specific objections, he failed to submit any additional evidence of his own. *Id.* at 28a-29a. In fact, Butler expressly stated that "'[a]ll of the documentary evidence on which Respondent relies herein is already on file with the Court.'" *Id.* at 29a (quoting James E. Butler's Response to GM's 'Tab E' Submission at 2 n.2 (Apr. 1, 1996)). Therefore, the District Court concluded that "evidently the evidentiary hearing requested by Butler was to be without evidence." Pet. App. at 29a. Accordingly, the court denied Butler's request for an evidentiary hearing. Pet. App. at 37a.

The District Court then turned to the task of evaluating in excruciating detail GM's statement of costs and expenses. *Id.* at 37a-98a. The court carried out this task under the appropriate legal standard, emphasizing that GM "certainly bears the burden of proving both the fact and the amount of its losses as well as how Butler's conduct proximately caused those losses." *Id.* at 34a-35a (citing *Buffington v. Baltimore County*, 913 F.2d 113, 135 (4th Cir.1990), *cert. denied*, 499

U.S. 906 (1991)). Ultimately, in an exhaustive 74-page Final Report and Recommendation, the court concluded that GM should recover a total of $190,541.31 in fees and costs incurred as a result of Butler's misconduct. Pet. App. at 99a.

The Fourth Circuit "carefully reviewed" the District Court's painstakingly detailed report and recommendations, as well as Butler's objections thereto and GM's response. *Id.* at 11a. The Court of Appeals commended the District Judge for "wad[ing] through the murky waters of legal billing," and held that there was "no error in his meticulous findings of fact or conclusions of law." *Id.* Accordingly, the Fourth Circuit adopted the District Court's report and recommendation in its entirety. *Id.* at 12a.

REASONS FOR DENYING THE WRIT

THE FOURTH CIRCUIT PROPERLY EXERCISED ITS CIVIL CONTEMPT POWERS.

Petitioner raises several issues masquerading as circuit splits, based chiefly on citations that confuse settled distinctions between civil compensatory contempt proceedings, civil coercive contempt proceedings, and criminal contempt proceedings. In the end, however, this case is simply about an attorney's intentional violations of the specific terms of a court order, which led to the unremarkable result that the Court of Appeals required him to compensate the opposing party for the expenses germinating from the need to respond to his misconduct. The case involves no issues of general interest or importance; to the contrary, the case serves only as a basic and unwelcome reminder that the routine enforcement of judicial orders often leads to unduly contentious and protracted proceedings. This message, as well as the true nature of these proceedings, is conveyed best in the exhaustive report filed by Judge Doumar, *see* Pet. App. at 12a-99a, which the Court of Appeals adopted in its entirety, *see id.* at 10a-12a.

A. The Fourth Circuit Properly Denied Butler's Request for an Evidentiary Hearing Regarding the Amount of the Compensatory Sanction.

Petitioner brazenly asserts that "[t]he Fourth Circuit's denial of an evidentiary hearing in this case was a denial of due process." Pet. at 21. Butler apparently seeks to suggest that the Fourth Circuit held him in contempt without affording him any chance to meet the allegations against him. Any such suggestion is wholly false.

Before holding Butler in contempt, the Fourth Circuit gave him (as well as GM) the opportunity to brief the issues of whether Butler had violated the March 23 Order and, if so, what sanctions were appropriate. The Court then gave Butler (as well as GM) the opportunity to present oral argument on those issues at a hearing in which both parties were represented by counsel. At no time did Butler contend that an evidentiary hearing was necessary to resolve some disputed issue of material fact regarding the underlying events. To the contrary, he did not request an "evidentiary hearing" until *after* the Fourth Circuit had held him in contempt, and then only with respect to the appropriate *amount of compensation* due to GM under the Fourth Circuit's ruling.

After the Fourth Circuit referred the matter to the District Court, the parties were given the opportunity to file additional briefs and to present additional argument. At the same time, Butler insisted that he was constitutionally entitled to an "evidentiary hearing." When asked by the District Court what he hoped to accomplish at such a hearing, however, Butler had no answer. As the District Court noted, Butler conceded that the hourly rates charged by GM's outside counsel were reasonable. Pet. App. at 27a-28a. Even more to the point, Butler conceded that "'[a]ll of the documentary evidence on which [he] relies herein is already on file with the Court.'" *Id.*

at 29a (quoting James E. Butler's Response to GM's 'Tab E' Submission at 2 n.2 (Apr. 1, 1996)).

Because Butler failed to identify any material issue of disputed fact that required resolution at an evidentiary hearing, he had no constitutional right to such a hearing. "Any more evidence would be merely cumulative, and there has been no showing that it would benefit anyone, except for the entertainment of the participating advocates." Pet. App. at 37a.[2] Having given Butler every chance to articulate any conceivable grounds for drawing out the judicial process even further, the District Court finally concluded that "evidently the evidentiary hearing requested by Butler was to be without evidence." Pet. App. at 29a. Under these circumstances, the District Court reasonably concluded that "[t]here is nothing that would be provided by any evidentiary hearing other than for a few hours of bickering." *Id.* at 29a.

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[2] Indeed, the District Court's exasperation with Butler on this score was palpable:

> The Court has afforded [Butler] numerous opportunities to state exactly why an evidentiary hearing is necessary; not in the abstract, amorphous principles of due process, but rather precisely what witnesses Butler believes he would need to call or what evidence would need to be produced. He has identified not a single individual whose live testimony would aid the Court's decisional process. The Court also afforded [Butler] every opportunity to put forth documentation and other written evidence which would rebut GM's claims. He has put forth a few affidavits, which have been discussed above, and identified certain documents in response to the Court's interrogatory. . . . Once the sun burns through the fog of [Butler's] persistent arguments supporting his demand for an evidentiary hearing, we are left with only one conclusion: "there is no there there."

Pet. App. at 35a-36a (quoting Gertrude Stein, *Everybody's Autobiography* 289 (1937)).

Butler's assertion that this case implicates a "conflict among the circuits" on the need for an evidentiary hearing in contempt proceedings, Pet. at 18, is thus fanciful. It is axiomatic that "[d]ue process is flexible and calls for such procedural protections as the particular situation demands." *Gilbert v. Homar,* 117 S. Ct. 1807, 1812 (1997). The extent to which due process requires an evidentiary hearing in a contempt proceeding depends on the nature of the proceeding and the issues in dispute. Summary judgment motions are granted all the time against parties who are unable to identify any genuine issue of material fact in particular cases. Accordingly, there is no inconsistency between this case and those cases that Butler identifies as having "recognized th[e] right to an evidentiary hearing in broad terms." Pet. at 19. None of those cases holds that an alleged contemnor is entitled to burden the court with an unnecessary evidentiary hearing even where, as here, he could not articulate any genuine issue of material fact that is legitimately in dispute.

B. The Contempt Sanction Imposed Here Is Civil, Not Criminal, in Nature.

One of Butler's principal contentions is that the contempt sanction imposed below is inherently criminal, rather than civil, in nature, and that the Fourth Circuit violated his due process rights by failing to afford him the procedural protections of the criminal law. Pet. at 21-24. The argument is premised on Butler's assertion that the Fourth Circuit's sanction is punitive rather than compensatory. That assertion is frivolous.

The Fourth Circuit was keenly aware of the distinction between civil and criminal contempt, and took pains to emphasize that the sanction imposed here was compensatory rather than punitive in nature. Pet. App. at 7a. The District Court, in calculating the appropriate amount of the sanction, emphasized the same point. *Id.* at 33a-35a. The fine imposed, accordingly, was carefully limited to the sums that GM was

forced to expend to remedy Butler's violation of the March 23 Order, both in the *Moseley* and *Cockrum* cases and in the Fourth Circuit itself. The District Court required GM to establish with specificity not only the fact and amount of its expenditures, but also the causal nexus between those expenditures and Butler's misconduct. *Id.* at 34a-35a. The resulting fine was to be paid to GM, not to the court. Under these circumstances, the sanction was clearly compensatory (and hence civil) in nature. "If the relief provided is a fine, *it is remedial when it is paid to the complainant*, and punitive when it is paid to the court." *Hicks ex rel. Feiock v. Feiock*, 485 U.S. 624, 632 (1988) (emphasis added).

In any event, the issue involves at most the application of settled law to the facts of this case. Butler cannot (and does not) contend that the Fourth Circuit erred as a matter of law in describing the differences between civil and criminal contempt. To the contrary, that court emphasized that "the remedies and sanctions must be remedial and compensatory and, unlike criminal contempt, nonpunitive." Pet. App. at 7a (citing *United States v. United Mine Workers of Am.*, 330 U.S. 258, 302-04 (1947)). Butler simply challenges the findings below regarding the *extent* of the "compensable loss" suffered by GM as a result of Butler's misconduct under the specific facts of this case. Needless to say, that factbound determination does not warrant this Court's review.

C. The Fourth Circuit's March 23 Order Was Not Ambiguous.

Butler also argues that *no* contempt sanction, whether civil or criminal, is appropriate here on the ground that the Fourth Circuit's March 23 Order was insufficiently clear and specific to provide an "unmistakable command." Pet. at 16-18. According to Butler, the Fourth Circuit's statement that the recusal order was stricken and "should not hereafter be cited as authority" was merely "precatory," Pet. at 17, and did not

provide him with "fair notice" that he was barred from citing the order, *id.*

Merely to restate this argument is to refute it. Any person of ordinary intelligence, and certainly an officer of the Court, should have no difficulty understanding the meaning of the March 23 Order. Whatever the meaning of the word "should" in other contexts, in this context its meaning was crystal clear: Butler was forbidden to cite the stricken passages of the recusal order. Indeed, the court stressed precisely the conduct that was proscribed by citing as an example of forbidden conduct the use that another attorney had made of the stricken recusal order in citing it before another tribunal. *See* Pet. App. at 102a n.1. If Butler had any question about the meaning of the court's command, moreover, he was free to ask the Fourth Circuit for clarification. He did nothing of the sort. His current attempt to discern ambiguity in the March 23 Order is nothing but belated sophistry.

In any event, Butler's challenge to the specificity of the March 23 Order at most raises a factbound challenge to the Fourth Circuit's application of settled law. Butler cannot (and does not) contend that the Fourth Circuit erred as a matter of law in describing the legal standards governing the specificity required for contempt sanctions. To the contrary, the Fourth Circuit emphasized that contempt sanctions are appropriate only where "the putative contemnor has violated an order that is clear and unambiguous." Pet. App. at 6a (quoting *Project B.A.S.I.C. v. Kemp*, 947 F.2d 11, 16 (1st Cir.1991)). Butler quarrels only with the application of that established standard to the specific facts of this case.

Needless to say, the "circuit conflict" Butler alleges is wholly illusory. The two cases on which he relies, *see* Pet. at 17 (citing *United States v. Robinson*, 922 F.2d 1531, 1534 (11th Cir. 1991), and *In re Baum*, 606 F.2d 592, 593 (5th Cir. 1979)), both were *criminal* contempt proceedings that involved

wholly different facts: (1) *Robinson*, involved the alleged violation of a "precatory" and non-binding court rule of which an attorney was deemed not to be on notice, 922 F.2d at 1534; and (2) *Baum* involved the alleged violation of a court order of uncertain scope that had vacated a notice of deposition, 606 F.2d at 593. In contrast, the order at issue in this case gave rise only to compensatory civil contempt proceedings, and it clearly put Butler on notice that he should not cite the stricken portions of the recusal order—which, of course, he promptly proceeded to do on two separate occasions in a calculated effort to procure an undeserved advantage before other courts in separate litigation against GM.

D. The Settlement of the Underlying Litigation Did Not Divest the Fourth Circuit of Authority to Enforce Its March 23 Order.

Butler also argues that the settlement of the underlying *Cameron* action divested the Fourth Circuit of authority to enforce its March 23 Order. Indeed, he asserts this case implicates "a clear conflict among the lower courts" on the question whether a court may impose a civil contempt sanction after the termination of an underlying action. Pet. at 24. Again, his erroneous claim rests on the self-serving conflation of different categories of contempt proceedings.

The settlement of the *Cameron* case did not wipe the Fourth Circuit's March 23 Order off the books. That settlement neither *purported to* nor *could* accomplish anything of the kind, since private parties have no authority to alter legal obligations imposed by a court. *Cf. U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 26-27 (1994). The March 23 Order thus remains binding law to this day, and will continue to remain binding law unless and until it is vacated by the

Fourth Circuit or by this Court.[3] The ongoing vitality of the Fourth Circuit's Order, in other words, is not contingent on the ongoing vitality of the *Cameron* case. Indeed, the March 23 Order was entered in a *mandamus* proceeding that is distinct from, and collateral to, the underlying case.

In addition, the Fourth Circuit emphasized that the civil contempt sanction here was *compensatory* rather than *coercive* in nature. *See* Pet. App. at 8a n.3. This Court has upheld judicial authority to resolve pending sanctions disputes by awarding compensatory relief even after the termination of an underlying action. *See, e.g., Willy v. Coastal Corp.*, 503 U.S. 131, 137-39 (1992); *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 395-96 (1990). A court's power to award coercive relief, in contrast, necessarily ends along with the litigation in which such relief is sought—because after the litigation is over, "there [is] nothing to coerce [the alleged contemnor] to do." *Martin v. Guillot*, 875 F.2d 839, 845 (11th Cir. 1989); *see also United States Catholic Conf. v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 76 (1988) (authority to impose coercive civil contempt order necessarily falls with jurisdiction over case). Butler attempts to gloss over the critical distinction between compensatory and coercive civil contempt, broadly asserting that "the disposition of an underlying action terminates the judicial power to impose *a civil contempt sanction* in connection with that action." Pet. at 24 (emphasis added). This assertion is overbroad and consequently incorrect.

Butler also asserts that the decision below conflicts with decisions from other circuits holding that "'there is no such thing as an independent cause of action for civil contempt.'" Pet. at 25 (quoting *D. Patrick, Inc. v. Ford Motor Co.*, 8 F.3d

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[3] In addition, of course, it would have been unethical for Butler even to have attempted to resolve the pending contempt proceeding against *him* as part of the settlement he negotiated for his clients in the *Cameron* case.

455, 459 (7th Cir. 1993)). That assertion, too, is mistaken. This case does not implicate any such conflict for the simple reason that this case does not involve an "independent cause of action" for civil contempt. As noted above, the Fourth Circuit's March 23 Order was binding law at the time that Butler violated it, and remains binding law to this day. After GM learned of Butler's violations of that Order, GM did not seek to file a new cause of action; instead, it returned to the Fourth Circuit and asked that court to hold Butler in contempt. A request for a court to enforce an order of ongoing vitality, needless to say, is not the same thing as initiating an "independent cause of action" for civil contempt. GM's petition for relief in the Fourth Circuit thus bore the same caption and the same docket number as the mandamus petition in which the March 23 Order was entered.

In all of the cases on which Butler relies, in contrast, the question was whether a litigant could file a separate and distinct cause of action for contempt. *See* Pet. at 25 (citing *D. Patrick*, 8 F.3d at 459; *Finn v. Schiller*, 72 F.3d 1182, 1188 (4th Cir. 1996); and *Blalock v. United States*, 844 F.2d 1546, 1550 (11th Cir. 1988) (*per curiam*)). None of those cases remotely held that a party could not invoke the judicial contempt powers to enforce an order of ongoing vitality. Indeed, that is the only proper way to obtain legal relief against a party who violates judicial orders. Moreover, the fact that one of the cited cases is from none other than the Fourth Circuit only underscores that this case does not implicate the circuit split alleged by Butler.

E. The Fourth Circuit Did Not Deny Butler Dispassionate Review.

Finally, Butler asserts that the Fourth Circuit "yielded to passion and put aside its better judgment," Pet. at 15, and that intervention by this Court is necessary to provide "dispassionate" review, *id.* at 14. That argument is baseless

and, to say the least, ironic.

Far from "yield[ing] to passion," the Fourth Circuit conducted these proceedings in a most restrained and temperate manner. The court carefully chronicled the facts underlying its judgment of contempt—indeed, Butler does not even allege any factual error underlying that judgment. The court then referred the matter to a district court to calculate the appropriate amount of the compensatory sanction. The District Court proceeded to make "meticulous" findings of fact and conclusions of law in an exhaustive 74-page Report and Recommendation. The Fourth Circuit adopted the District Court's findings in their entirety—and those findings, again, now stand unchallenged. Needless to say, Butler's request for "dispassionate" review by this Court rings hollow when he cannot identify any way in which the decision below is actually tainted by unwarranted "passion." Butler's characterization of the modest compensatory sanction imposed below as "manifestly unjust," Pet. at 14, speaks volumes about his peculiar view of "justice."

In any event, it is especially inappropriate at this late date for Butler to seek this Court's review of the contempt judgment entered by the Fourth Circuit almost two years ago. Butler could have sought such review back in 1995, but failed to do so. His failure to file a timely petition for certiorari, after the Chief Justice denied a last-minute request for an extension of time, strongly undercuts his current claim of victimization by the Fourth Circuit. Over the past two years, the judicial system has devoted inordinate time and resources to assessing the appropriate amount of the contempt sanction against Butler. Throughout that period, the *fact* of Butler's contempt itself has never been in doubt. Thus, while Butler is correct that this Court has the *power* to review the underlying judgment of contempt at this time, *see* Pet. at 2 n.1, he fails to identify any reason why the Court should exercise its *discretion* to grant his

petition for review in the unattractive circumstances of this case.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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July 29, 1997

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 94-1011
(CA-93-1278-6-3)

In Re: GENERAL MOTORS CORPORATION,
a Delaware Corporation.

Petitioner.

ORDER

We have examined the petitioner's January 18, 1994, motion before the district court which represents, inter alia, an order recusing the Honorable G. Ross Anderson, Jr., from further participation in this case. The claims made by the petitioner in its motion and accompanying memorandum, if true, are extremely serious. A recusal order might affect significantly issues in our pending consideration of the petition for mandamus review of the district court's discovery orders. Consequently, we partially lift our stay of all proceedings in the district court solely to allow the district court to hear and rule upon the issue of recusal. The stay of all other proceedings in the district court remains in effect. The district court shall hear and rule upon the issue of recusal by February

28, 1994, and forthwith thereafter, forward to this Court a copy of its order.

Further, the portion of our stay that remains in effect is hereby extended until such time as we have ruled on the pending petition for mandamus review. The hearing scheduled for February 25, 1994, is continued and will be rescheduled for a date subsequent to the district court's ruling on recusal.

Entered this 18th day of February, 1994, at the direction of Judge Russell, Judge Hamilton, and Judge Williams.

/s/ Donald Russell
Circuit Judge

/s/ Clyde H. Hamilton
Circuit Judge

/s/ Karen J. Williams
Circuit Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

Mark D. CAMERON, Plaintiff,

vs.

GENERAL MOTORS CORPORATION, a Delaware Corporation, Defendant.
C/A No. 6:93-1278-3

Steven W. CAMERON, Plaintiff,

vs.

GENERAL MOTORS CORPORATION, a Delaware Corporation, Defendant.
C/A No. 6:93-1279-3

Laurie CAMERON, Plaintiff,

vs.

GENERAL MOTORS CORPORATION, a Delaware Corporation, Defendant.
C/A No. 6:93-1279-3

ORDER

GEORGE ROSS ANDERSON, Jr., District Judge

These matters are before the Court on the Defendant's Motion to Recuse and to Vacate the Orders resulting from hearings on December 10, 17 and 21, 1993. The Defendant has moved for recusal under 28 U.S.C. § 144 and 28 U.S.C. § 455(a).

This case has been primarily a discovery war of unprecedented magnitude laced with acrimony bordering on open hostility between the disputatious attorneys. To appreciate the extent of the tortured history, there have been a total of sixty-nine (69) motions filed.[1] One of the hearings on production consisted of twenty-seven (27) file boxes of documents. The Court was prepared to spend Christmas holidays going through these documents, but was saved this task when Plaintiffs' attorneys voluntarily admitted their errors and sent the Defendant's attorneys a check for Fifty-three Thousand and No/100 ($53,000.00) Dollars in accordance with the Court's previous Order for Sanctions.

Hardly a document has been produced without claim of privilege. Literally thousands of documents have been reviewed which has necessitated time consuming court hearings and countless hours of document examination by the Court. Paper accumulated to date fills three (3) cabinet drawers in my Chambers, yet discovery is still in its infancy. Both parties have been repeatedly warned against filing frivolous discovery motions. The Defendants have been non-responsive and evasive in practically all discovery requests.

I. DEFENDANT'S MOTION TO RECUSE PURSUANT TO 28 U.S.C. § 144.

FINDINGS OF FACT

Section 144 is entitled "Bias or Prejudice of Judge" and requires recusal by a district judge when a legally sufficient and timely affidavit of bias is filed by a party accompanied by a Certificate of Good Faith of Counsel. The full text of this statute is as follows: Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit

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[1] Twenty-one (21) in C/A 6:93-1278-3; Thirty (30) in C/A 6:93-1279-3; and eighteen (18) in C/A 6:93-1280-3.

that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding. The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith. 28 U.S.C. § 144.

An analysis of the technical requirements of 28 U.S.C. § 144 reveals that the following are mandated: (1) An affidavit; (2) By a party; (3) Timely filed; (4) That is legally sufficient; (5) Which states that a judge before whom the action is pending has a personal bias or prejudice; (6) Against the party or in favor of an adverse party (arising from an extrajudicial source); and

The affidavit must: (7) State the facts and reasons for the affiant's belief that personal bias or prejudice exists; (8) "A party may file only one such affidavit in any case;" and (9) "It", i.e., the affidavit of the party, (10) "Shall be accompanied by a Certificate of Counsel of Record stating that it is made in good faith."

"A judge against whom an affidavit under § 144 is filed must pass upon the legal sufficiency of the facts alleged. *Simmons v. United States*, 302 F.2d 71, 75 (3rd Cir. 1962).

It is equally the duty of a judge, however, to deny the relief claimed on account of the facts stated in the affidavit if they are legally insufficient, as it is to grant relief if they are sufficient. *Id.*" *Sine v. Local No. 992 International Brotherhood of Teamsters*, 882 F.2d 913, 914 (4th Cir. 1989); *Hinman v. Rogers*, 831 F.2d 937, 939 (10th Cir. 1987); *Brody v. President & Fellows of Harvard College*, 664 F.2d 10, 12 (1st Cir. 1981), *cert. denied*, 455 U.S. 1027, 102 S.Ct. 1731, 72 L.Ed.2d 148 (1982); *United States v. Haldeman*, 559 F.2d 31,

139 n. 360 (D.C.Cir. 1976), *cert. denied*, 431 U.S. 933, 97 S.Ct. 2641, 53 L.Ed.2d 250 (1977); *Simmons v. United States*, *supra*. Far from being "virtually automatic" as the Defendant would have the Court believe, the Court is under a duty to pass upon the legal sufficiency of the affidavit filed. Failure to do so is error. *Sine v. International Brotherhood*, *supra*, at 914.

Under section 144, a judge is presumed to be qualified to hear the case, and there is a substantial burden on the moving party to demonstrate otherwise. *In re Union Leader*, 292 F.2d 381, 388 (1st Cir.), *cert. denied*, 368 U.S. 927, 82 S.Ct. 361, 7 L.Ed.2d 190 (1961); *Hinman v. Rogers*, *supra*, at 939.

The requirements of the statute must be strictly adhered to, and failure to meet those requirements is absolute grounds for denial of the motion. *United States v. Anderson*, 433 F.2d 856, 859 (8th Cir. 1970).

Under 28 U.S.C. § 144, the only claim of bias to be considered is that against a party. *United States v. Burt*, 765 F.2d 1364, 1368 (9th Cir. 1985); *Gilbert v. City of Little Rock, Arkansas*, 722 F.2d 1390, 1398 (8th Cir. 1983), *cert. denied*, 104 S.Ct. 2347, 466 U.S. 972, 80 L.Ed.2d 820 (1983).

1. AN AFFIDAVIT BY A PARTY:

"Affidavits filed under § 144 are strictly scrutinized for form and timeliness, *United States v. Womack*, 454 F.2d 1337, 1341 (5th Cir. 1972), *cert. denied*, 414 U.S. 1025, 94 S.Ct. 450, 38 L.Ed.2d 316 (1973), and, therefore, before reaching the merits of the recusal motion, it is necessary to determine whether these procedural requirements have been met." *Lamborn v. Dittmer*, 726 F.Supp. 510, 514 (S.D.N.Y. 1989).

The Motion to Recuse and Vacate Orders was filed by the Defendant on January 18, 1994.

Section 144 expressly requires the "party" to make and file a legally sufficient affidavit asserting that the judge before whom the matter is pending has a personal bias against him or

in favor of an adverse party in support of the Motion to Recuse.

Where the affidavit filed is signed by counsel for the party, the motion is invalid and should be denied. *Gilbert v. City of Little Rock, Arkansas, supra*, at 1398; *Roberts v. Bailer*, 625 F.2d 125, 128 (6th Cir. 1980); *United States ex rel. Wilson v. Coughlin*, 472 F.2d 100, 104 (7th Cir. 1973); *Giebe v. Pence*, 431 F.2d 942, 943 (9th Cir. 1970); *Paschall v. Mayone*, 454 F.Supp. 1289, 1299-1301 (S.D.N.Y. 1978) (affirming denial of § 144 disqualification motions accompanied only by affidavit of counsel); *Gilbert v. City of Little Rock, Arkansas*, 722 F.2d 1390, 1398 (8th Cir. 1983), *cert. denied*, 104 S.Ct. 2347, 466 U.S. 972, 80 L.Ed.2d 820 (1983).

Three (3) days later, on January 21, 1994, the Affidavit of Susan E. Mason, Esquire, was filed. The Affidavit asserts that the affiant is "an attorney in the Office of the General Counsel" for General Motors Corporation and "a member of the General Motors' legal staff" who "manage(s) the defense" of these cases.

The Affidavit does not state that Staff Attorney Mason is an officer in the corporation and only indicates that she is a legal staff counsel in this litigation. Therefore, this is not an affidavit "of a party" and is legally insufficient under 28 U.S.C. § 144.

2. ONLY ONE AFFIDAVIT IN SUPPORT OF A MOTION TO RECUSE MAY BE FILED UNDER 28 U.S.C. § 144 AND THAT AFFIDAVIT MUST BE SERVED WITH THE MOTION TO RECUSE.

A motion to recuse under 28 U.S.C. § 144 must be accompanied by a legally sufficient affidavit of a party which avers a personal bias or prejudice against the party.

Only one affidavit may be filed. *United States v. Anderson*, 433 F.2d 856, 859 (8th Cir. 1970).

Rule 6(d) of the Federal Rules of Civil Procedure mandates: "When a motion is supported by an affidavit, the affidavit shall be served with the motion...."

The failure to accompany a motion to recuse asserting personal bias pursuant to 28 U.S.C. § 144 with a timely and sufficient affidavit renders denial of the motion appropriate. *United States v. Branch*, 850 F.2d 1080, 1083 (5th Cir. 1988); *Martin-Trigona v. Shiff*, 573 F.Supp. 1237, 1244 (D.Conn. 1983); *Galella v. Onassis*, 487 F.2d 986, 997 (2nd Cir. 1973); *Davis v. Fendler*, 650 F.2d 1154, 1163 (9th Cir. 1981).

Additional and subsequently filed affidavits need not be considered. *United States v. Anderson*, *supra*, at 859; *United States v. Hoffa*, 382 F.2d 856, 861 (6th Cir. 1967); *Martin v. Texas Indem. Ins. Co.*, 214 F.Supp. 477 (N.D.Tex. 1962), *cert. denied*, 377 U.S. 971, 84 S.Ct. 1652, 12 L.Ed.2d 470 (1964).

The Defendant filed its Motion to Recuse and Vacate Orders on January 18, 1994. Attachment One (1) to that motion is the Affidavit of Stephen G. Morrison, Esquire, an attorney of record for the Defendant. This Affidavit deals with the procurement of the audio tapes of speeches given by this Judge, Mr. James E. Butler, Jr., and Mr. J. Kendall Few, and alleges at paragraph seven (7) my presence "during the remarks made by Mr. Butler and Mr. Few."

Attachment D is the Affidavit of Ms. Angela C. Quintana which states that she transcribed three audio tapes containing seminar presentations by this Judge, by Mr. James E. Butler, Jr. and Mr. J. Kendall Few. This affidavit also states at paragraph two (2) that the transcriptions were made on December 16, 1993 and paragraph three (3) states that "the transcription of these presentations are being provided for the purposes of the captioned litigation." Paragraph one (1) asserts that Ms. Quintana is an employee of Defendant's law firm.

The third affidavit filed with the Motion to Recuse is Attachment Two (2), the Affidavit of Joel H. Smith, Esquire, an attorney of record for the Defendant. Mr. Smith's Affidavit

recounts his recollection of a telephone call allegedly occurring on December 8, 1993, which he claims to have had with the Court concerning the Court's scheduling of an expedited hearing and the Court's refusal to reschedule the expedited hearing.

All three affidavits filed with the Motion to Recuse on January 18, 1994, are legally insufficient for the following reasons: (1) No affidavit filed with the Motion to Recuse is the affidavit of a party; and (2) No affidavit filed with the Motion to Recuse avers that this Judge before whom the case is pending has a personal bias or prejudice against the party.

The Affidavit of Defendant's staff lawyer charged with managing these cases was not filed until January 21, 1994. It was not filed with the Motion to Recuse on January 18, 1994. It is the fourth in the series of affidavits filed. As noted earlier, additional subsequent affidavits need not be considered since 28 U.S.C. § 144 mandates the filing of only one affidavit. Therefore, the later filed Affidavit of Ms. Mason need not be considered. It was neither timely nor legally sufficient.

3. TO SUPPORT A MOTION TO RECUSE PURSUANT TO 28 U.S.C. § 144, A LEGALLY SUFFICIENT AFFIDAVIT MADE BY A PARTY MUST BE FILED "ACCOMPANIED BY A CERTIFICATE OF COUNSEL OF RECORD STATING THAT IT IS MADE IN GOOD FAITH".

The Defendant's Motion to Recuse was filed on January 18, 1994 and was accompanied by the three (3) Affidavits discussed in the prior section of this Order. No Certificate of Counsel of Record stating that any of the three Affidavits filed were made in good faith accompanied the filing.

On January 21, 1994, the Defendant filed the fourth conclusory affidavit of Defendant's staff attorney stating her

"belief" that this Court had "a personal bias or prejudice" against the party defendant. This fourth affidavit was also not "accompanied by a Certificate of Counsel of Record stating that it is made in good faith."

On February 3, 1994, a Certificate executed by counsel of record was filed. The Certificate certified that (1) The Motion to Recuse and Vacate Orders and (2) the accompanying Affidavits "are made in good faith."

The failure to accompany a Motion to Recuse with "the good faith certification as expressly required by section 144" is a "significant defect and shall defeat a motion for disqualification." *Martin-Trigona v. Shiff, supra*, at 1187, citing *Walters v. United States*, 404 F.Supp. 996, 998 (S.D.N.Y. 1975), *aff'd mem.*, 542 F.2d 1166 (2nd Cir. 1976). The Motion to Recuse in the cases sub judice, and affidavits filed on January 18, 1994, were not accompanied by a Certificate of Counsel.

A motion to recuse "is deficient in form because the affidavit was not 'accompanied by a Certificate of Counsel of Record stating that it is made in good faith' as required by § 144." *Lamborn v. Dittmer*, 726 F.Supp. 510, 515 (S.D.N.Y. 1989). Neither the three (3) Affidavits filed on January 18, 1994, nor the Affidavit of Defendant's staff attorney filed on January 21, 1994, were accompanied by a Certificate of Counsel.

"If a certificate is to serve the purpose of shielding a court which cannot test the truth of claimed facts, it should at least carry the assertion that counsel believes the facts alleged to be accurate and correct." In re Union Leader, *supra*, at 385, *cert. denied*, 368 U.S. 927, 82 S.Ct. 361, 7 L.Ed.2d 190 (1961); *Lamborn v. Dittmer*, *supra*, at 515; *Duplan v. Deering Milliken*, *supra*, at 508.

Not only should the Certificate attest to the good faith of the affiant, but the Certificate should also state that counsel is himself acting in good faith in making the Certificate.

Selfridge v. Gynecol, Inc., 564 F.Supp. 57, 58 (D.Mass. 1983).

The Affidavit and the Certificate are strictly construed against the party seeking disqualification. 13A Wright, Miller & Cooper, Federal Practice & Procedure: Jurisdiction, § 3551 at 631-633 (1984). The Certificate of Counsel of Record in these cases is both procedurally and legally deficient under 28 U.S.C. § 144.

The Certificate of Counsel of Record was filed on February 3, 1994, and *did not accompany* any of the four (4) Affidavits filed in this case as would be required under 28 U.S.C. § 144. Rather, the Certificate, according to the Certificate of Service, accompanied Defendant's Reply Memorandum in Support of the Defendant's Motion to Recuse and Vacate Orders.

Additionally, the Certificate of Counsel of Record only certifies that (1) the Motion to Recuse and Vacate Orders and (2) "the accompanying Affidavits, are made in good faith." The three (3) Affidavits accompanying the Motion to Recuse and Vacate Orders referred to in the Certificate of Counsel of Record are (1) the Affidavit of counsel of record, Stephen G. Morrison; (2) the Affidavit of counsel of record, Joel H. Smith; and (3) the Affidavit of Nelson, Mullins employee, Ms. Angela C. Quintana. None of these three (3) affidavits "accompanying" the Motion to Recuse and Vacate Orders are (1) the Affidavit of a party; and (2) no Affidavit "accompanying" the Motion to Recuse and Vacate Orders asserts that the Judge before whom the cases *sub judice* are pending "has a personal bias or prejudice" against the party defendant.

The Certificate of Counsel of Record makes no reference to the Affidavit of Defendant's staff attorney, Susan E. Mason, which was filed three (3) days after the Motion to Recuse and Vacate Orders. The Certificate only refers to the Affidavits "accompanying" the Motion. Pursuant to the mandates of 28 U.S.C. § 144, a party may file only one affidavit in any case and that affidavit "shall be accompanied

by a Certificate of Counsel of Record stating that it was made in good faith". Therefore, even if the Court were to assume that the Certificate filed February 3, 1994 remedied the technical defect inherent in the original three (3) "accompanying affidavits" filed with the Defendant's Motion to Recuse and to Vacate Orders, that defect would not be remedied as to the fourth Affidavit filed three (3) days after the Motion.

The "Certificate" is legally insufficient under section 144 to support the Defendant's Motion to Recuse and Vacate Orders.

4. TIMELY FILING:

"Section 144 also explicitly requires that a motion for recusal must be timely made.... In general, motions to recuse must be filed at the first opportunity after discovery of the facts tending to prove disqualification. *Duffield v. Charleston Area Medical Center*, 503 F.2d 512, 515 (4th Cir. 1974); *Chafin v. United States*, 5 F.2d 592, 594, 595 (4th Cir.), *cert. denied*, 269 U.S. 552, 46 S.Ct. 18, 70 L.Ed. 407 (1925)." *Sine v. Local No. 992 International Brotherhood of Teamsters*, *supra*, at 915.

Timeliness is an essential element of a recusal motion and is vital to prevent waste and delay. *United States v. Owens*, 902 F.2d 1154, 1155-1156 (4th Cir. 1989). In addition, timeliness is required to prevent a defendant from "test[ing] the waters with a particular judge and then tak[ing] steps to create recusal grounds if the waters proved uncomfortably hot." *Owens*, *Id.* at 1156; *see also*, *In re Union Leader Corporation*, *supra*, at 990.

Courts have held a lapse of twelve (12) days to render a recusal motion untimely. *In re Martin v. Trigona*, 573 F.Supp. 1237, 1244 (D.Conn. 1983). *See also In re Shoe Machinery Corp.*, 276 F.2d 77, 79 (1st Cir. 1960) ("We cannot permit a litigant to test the mind of a trial judge like a boy testing the temperature of the water in the pool with his toe,

and if found to his liking, decides to take a plunge.") Nothing is more important in an affidavit than timeliness, and its counterpart, waiver. *Id.* at 79. The statute does not permit second guessing.

The amount of time between the factual event allegedly creating grounds for recusal and the filing of the affidavits depends on the facts and circumstances surrounding the case.

Under the facts in this case, the recusal Motion filed January 18, 1994 and the Affidavit of Susan E. Mason, Esquire (even if it had been legally sufficient, which it is was not) alleges the Court's "participation" in the Auto Torts Seminar in Atlanta, Georgia as grounds for recusal. That seminar took place on December 3-4, 1993. The Affidavit of Ms. Mason was not filed until January 21, 1994, seven (7) weeks later.

"The United States Court of Appeals for the Fourth Circuit has repeatedly stated that a reasonable challenge against a trial judge for bias and prejudice 'must be made at the first opportunity after discovery of the facts ... [allegedly requiring] disqualification.' "*Duplan Corporation v. Deering Mulliken, Inc., supra*, at 509, citing *Chafin v. United States*, 5 F.2d 592, 595 (4th Cir. 1925), *cert. denied*, 269 U.S. 552, 46 S.Ct. 18, 70 L.Ed. 407, quoted with approval in *Duffield v. Charleston Area Medical Center, Inc.*, 503 F.2d 512 (516) (4th Cir. 1974) (Russell, J.).

In the interim, the Court held three (3) motions hearings and issued Orders regarding discovery and other pretrial matters in this case between the date of the Seminar and the filing of the Defendant's Motion.

The hearings were held on December 10, 1993, December 17, 1993, and December 21, 1993. Additional hearings were held on January 21, 1994 and January 25, 1994. An oral Order was issued December 10, 1993 granting General Motors' Motions for Protective Orders; the other Orders are dated December 30, 1993, filed January 4, 1994 (directing General Motors to produce all documents relating to 14 "Key

Memo's" and directing Plaintiff to submit evidence of document destruction); December 30, 1993, filed January 4, 1994 (authorizing depositions of outside legal counsel; December 30, 1993, filed January 4, 1994 (denying General Motor's motion for certification of issues for interlocutory appeal or for a stay of Orders dated December 17 and 21, 1993 pending appeal); December 30, 1993, filed January 4, 1994 (ordering inspection of computer database); and December 30, 1993, filed January 4, 1994 (directing General Motors to produce additional documents *in camera*).

Even more telling is the fact that the Defendant continued to file motions of its own in this case, submitting no less than four (4) motions for this Court's consideration between the time of the Seminar and the filing of the Motion to Recuse on January 18, 1994. *See*, Defendant's Motion to Continue Hearing set for December 10, 1993, filed December 10, 1993; Motion for Affirmation of Privileges, filed December 10, 1993; Memorandum on December 10, 1993 Hearing, filed December 17, 1993; and Motion for Certification of Issues, filed December 30, 1993. In addition, General Motors filed nineteen (19) Affidavits on various substantive (non-recusal) matters in the December 3, 1993 through January 18, 1994 time frame. One of the Defendant's Motions asked this Court to rule affirming General Motors' claims of privilege on hundreds of documents. It was only after this Court ruled on these issues in its five (5) Orders dated December 30, 1993 and filed January 4, 1994, (which disposed of Motions made and heard December 10, 17 and 21), that the Defendant found the Court's Seminar comments on December 3, 1993 to evidence an alleged personal prejudice against the defendant party under 28 U.S.C. § 144.

It is clear that counsel in this case waited to see the outcome of the Motions filed and heard relating to Plaintiffs' allegations of discovery abuse by counsel and only then decided to file the Motion to Recuse on January 18, 1994.

The Motion to Recuse and Vacate was not timely filed.

5. LEGAL SUFFICIENCY OF THE ONE SUPPORTING AFFIDAVIT OF A PARTY REQUIRED UNDER 28 U.S.C. § 144.

In assessing an affidavit's legal sufficiency, the Judge may not consider the truth of the facts alleged. *Berger v. United States*, 255 U.S. 22, 35-36, 41 S.Ct. 230, 234, 65 L.Ed. 481 (1921).

In passing on the legal sufficiency of an affidavit, "a judge must assume that the factual averments it contains are true, even if he knows them to be false. *United States v. Jeffers*, 532 F.2d 1101, 1112 (7th Cir. 1976), *aff'd in part and vacated in part*, 432 U.S. 137, 97 S.Ct. 2207, 53 L.Ed.2d 168 (1977); *United States v. Barnes*, 909 F.2d 1059, 1071 (7th Cir. 1990).

The factual averments must give "fair support to the charge of a bent mind that may prevent or impede impartiality of judgment." *Berger v. United States*, *supra*, 255 U.S. at 33-34, 41 S.Ct. at 233.

"The factual allegations which are said to show that 'bent of mind' must establish, by more than a prima facie case, that 'the mind of the judge is closed to justice'." *Duplan Corporation v. Deering Milliken, Inc.*, 400 F.Supp. 497, 507 (D.S.C. 1975).

The factual allegations and averments in the required affidavit of a party must not be mere conclusions, opinions, or rumors. *United States v. Haldeman*, 559 F.2d 31, 134 (D.C.Cir. 1976), *cert. denied*, 431 U.S. 933, 97 S.Ct. 2641, 53 L.Ed.2d 250 (1977).

Conclusions, rumors, beliefs, and opinions are not sufficient to form a basis for disqualification. *Berger v. United States*, *supra*, 255 U.S. at 34, 41 S.Ct. at 233, 65 L.Ed. 481 (1921) (construing predecessor statute).

The allegations in the affidavit of the party must be stated with particularity and must be definite as to times,

places, persons, and circumstances. *United States v. Haldeman*, *supra*, at 134.

The affidavit of the party is strictly construed against the affiant, and there is a substantial burden on the moving party to demonstrate that the judge is not impartial. *United States v. Hall*, 424 F.Supp. 508, 534 (W.D.Okla. 1975), *aff'd*, 536 F.2d 313 (10th Cir.), *cert. denied*, 429 U.S. 919, 97 S.Ct. 313, 50 L.Ed.2d 285 (1976); *Hinman v. Rogers*, 831 F.2d 937, 939 (10th Cir. 1987); *Lamborn v. Dittmer*, *supra*, at 514.

Intemperate statements are not a legally sufficient ground for a motion to recuse. *Hinman v. Rogers*, *Id.*, citing *Johnson v. Trueblood*, 629 F.2d 287, 291 (3rd Cir. 1980), *cert. denied*, 450 U.S. 999, 101 S.Ct. 1704, 68 L.Ed.2d 800 (1981).

The factual averments in the affidavit of the party must assert that the personal bias or prejudice against the party stems from an extrajudicial source, i.e., some source other than what the judge has learned through participation in the case. *United States v. Grinnell Corporation*, 384 U.S. 563, 583, 86 S.Ct. 1698, 1710, 16 L.Ed.2d 778 (1966); *United States v. Barnes*, *supra*, at 1071.

And that extrajudicial bias must result in an opinion on the merits on some basis other than what the judge learned from his participation in the case. *N.L.R.B. v. Honaker Mills*, 789 F.2d 262, 266 (4th Cir. 1986); *United States v. Crowell*, 586 F.2d 1020, 1027 (4th Cir. 1978), *cert. denied*, 440 U.S. 959, 99 S.Ct. 1500, 59 L.Ed.2d 772 (1979).

A review of the Affidavit of Defendant's staff attorney Susan E. Mason, Esquire, reveals that it is composed entirely of "conclusions", "opinions", and "beliefs". The Affidavit is then legally insufficient under 28 U.S.C. § 144 and under the rule set out in *Berger v. United States*, *supra*, 255 U.S. at 34, 41 S.Ct. at 233. Each and every averment in the Affidavit is premised solely and only on a "belief" held by the affiant.

The source of these "beliefs" is not disclosed. Obviously, none of the other Affidavits meet the statutory

criteria under Section 144.

6. PERSONAL BIAS OR PREJUDICE AGAINST A PARTY AND THE EXTRAJUDICIAL SOURCE REQUIREMENT.

28 U.S.C. § 144 requires that the Affidavit aver that "the judge before whom the matter is pending has a personal bias or prejudice" against the party. However, no fact supporting a personal bias or prejudice against the Defendant in this case is advanced.

Averment Two (2) in the Affidavit of Defendant's staff attorney Susan E. Mason states a "belief" that the Court has a personal bias or prejudice" against General Motors. A "belief" is legally insufficient. *Berger v. United States, Id.* No facts are stated supporting Ms. Mason's "belief" that an alleged "personal bias and prejudice" exists, only more "beliefs". Conclusory allegations do not constitute the required statement of "Facts", nor are the required "reasons" stated. Again, only "beliefs" not "facts" and "reasons" for the belief that bias or prejudice exists are enumerated in the Mason Affidavit.

Finally, the premise is fundamental that any alleged personal bias or prejudice as to the party in a case *sub judice* must stem from an extrajudicial source and not what the Court has learned in a particular case.

The Affidavit of Defendant's staff attorney, Susan E. Mason, Esquire, contains Averments Three (3) and Four (4) asserting a "belief" that the "personal bias and prejudice" stem from attendance at and participation in the South Carolina Trial Lawyers Association Continuing Legal Education Seminar on December 3 and 4, 1993. This is also legally insufficient to meet the requirements of 28 U.S.C. § 144.

Also, the Affidavit fails to assert that the alleged personal bias or prejudice has resulted in any opinion on the merits on some basis other than what the Court has learned

from its participation in the case. The Affidavit of Defendant's staff attorney fails to comply with the requirements of 28 U.S.C. § 144 under the strict scrutiny required.

CONCLUSIONS OF LAW AS TO DEFENDANT'S MOTION TO RECUSE AND VACATE ORDERS PURSUANT TO 28 U.S.C. § 144.

1. I find as a matter of law that the Affidavit of Stephen Morrison, one of Defendant's counsel of record, filed with and accompanying the Defendant's Motion to Recuse on January 18, 1994, in the cases *sub judice*, is legally insufficient, is not the Affidavit of a party, and does not aver that the Judge before whom the matter is pending has a personal bias or prejudice against the party defendant, all as required by 28 U.S.C. § 144.

2. I find as a matter of law that the Affidavit of Ms. Angela C. Quintana, filed with and accompanying the Defendant's Motion to Recuse, is legally insufficient, is not the Affidavit of a party, and does not aver that the judge before whom the matter is pending has a personal bias or prejudice against the party defendant, all as required by 28 U.S.C. § 144.

3. I find as a matter of law that the Affidavit of Joel H. Smith, one of Defendant's counsel of record, which was filed with the Defendant's Motion to Recuse on January 18, 1994 in the cases *sub judice*, is legally insufficient, is not the affidavit of a party, and does not aver that the judge before whom the matter is pending has a personal bias or prejudice, all as required by 28 U.S.C. § 144.

4. I find as a matter of law that the Motion by the party defendant pursuant to 28 U.S.C. § 144 was not timely made.

5. I find as a matter of law that the Affidavit of Susan E. Mason, one of Defendant's staff attorney, charged with the management of these cases is not the affidavit of a party as mandated by 28 U.S.C. § 144.

6. I further find as a matter of law that the Affidavit of Susan E. Mason, one of Defendant's staff attorneys, is legally insufficient in that the Affidavit is conclusory, and only avers opinions and beliefs, not the statement of facts required by 28 U.S.C. § 144.

7. I find as a matter of law that while 28 U.S.C. § 144 allows the filing of only one affidavit of a party with a party's motion to recuse, multiple insufficient affidavits were filed with this Motion to Recuse.

8. I find as a matter of law that the Court need not consider additional affidavits filed in support of a party's motion to recuse.

9. I find as a matter of law that the Affidavit of Susan E. Mason, Defendant's staff attorney, need not be considered as it was not filed with the Defendant's Motion to Recuse pursuant to 28 U.S.C. § 144, as required by Rule 6(d) of the Federal Rules of Civil Procedure, and was the fourth (4th) Affidavit filed.

10. I find as a matter of law that the Motion to Recuse and Vacate Orders pursuant to 28 U.S.C. § 144 and the three (3) "accompanying" Affidavits were legally insufficient in that they were not accompanied by a Certificate of Counsel of Record stating that the Affidavits were made in good faith.

11. I find as a matter of law that the Certificate of Counsel of Record filed February 3, 1994, is legally insufficient because the Certificate did not accompany any of the three (3) Affidavits filed on January 18, 1994.

12. I find as a matter of law that the Affidavit of Susan E. Mason, one of Defendant's staff attorneys, is legally insufficient because it was not accompanied by a Certificate of Counsel of Record stating that it was made in good faith as is mandated by 28 U.S.C. § 144.

13. I further find as a matter of law that even if the legal insufficiency of any one of the first three (3) Affidavits

filed accompanying the Defendant's Motion to Recuse and Vacate Orders on January 18, 1994, was abrogated by the subsequent filing of the Certificate of Counsel of Record, those Affidavits remain deficient in content pursuant to the mandated criteria enunciated under 28 U.S.C. § 144.

14. I find as a matter of law that the Certificate of Counsel of Record by its terms only certifies that the Affidavits accompanying the Motion to Recuse and Vacate Orders were made in good faith.

15. I find as a matter of law that the Certificate of Counsel of Record by its terms excludes the Affidavit of Defendant's staff attorney, Susan E. Mason, which did not accompany the Defendant's Motion to Recuse and which was later filed on January 21, 1994.

16. I find as a matter of law that the Certificate of Counsel of Record is legally deficient in that it accompanied, not the affidavit of a party, but the Defendant's Reply to Plaintiffs' Response to Defendant's Motion to Recuse and Vacate Orders filed February 3, 1994.

17. I further find as a matter of law that the Certificate of Counsel of Record is legally insufficient in that the Certificate fails to carry the assertion that counsel believes the facts alleged in any affidavit filed to be accurate and correct. *See In re Union Leader*, *supra*, at 385; *United States v. Danrahan*, 248 F.Supp. 471, 478 (D.D.C. 1965); *Duplan v. Deering Milliken*, *supra*, at 508; and *Lamborn v. Dittmer*, *supra*, at 515.

18. I find as a matter of law that the Defendant's Motion to Recuse and Vacate Orders pursuant to 28 U.S.C. § 144 is deficient in substance and in form for the reasons stated above.

19. I find as a matter of law that the Defendant's Motion to Recuse and Vacate Orders has failed to meet either the procedural or substantive requirements of 28 U.S.C. § 144.

20. I find as a matter of law that disqualification is not required by the Canons of the Code of Judicial Conduct.

The Defendant's Motion to Recuse and Vacate Orders pursuant to 28 U.S.C. § 144 is denied.

II. DEFENDANT'S MOTION TO RECUSE PURSUANT TO 28 U.S.C. § 455 FINDINGS OF FACT

Defendant appears to advance and rely upon five grounds for the assertion that a reasonable person might question this Court's judicial impartiality under 28 U.S.C. § 455(a):

1. ATTENDANCE AT THE SOUTH CAROLINA TRIAL ATTORNEYS' AUTO TORTS SEMINAR IN ATLANTA, GEORGIA ON DECEMBER 3RD AND 4TH, 1993.

General Motors counsel have asserted that my "*active participation in a plaintiffs' automobile torts seminar, which focused heavily on pending side-impact truck fire cases against General Motors*," (emphasis added), displays my "personal involvement in the subject matter."

First, the seminar is, and has been for sixteen (16) years, entitled "Auto Torts". A review of the program and seminar materials, however, reveals that this program encompassed two (2) days, December 3 and 4, 1993, and provided twelve (12) Continuing Legal Education Credit hours, including two (2) Continuing Legal Education hours for ethics.

My presentation involved a recent Fourth Circuit Court of Appeals case, *Strock v. Southern Farm Bureau Casualty Insurance Company*, an Unpublished Opinion that approves introduction and admission of computer animation into evidence, and two (2) recent United States Supreme Court decisions, *Daubert v. Merrell Dow*, and *TXO Production Corporation v. Alliance Resources Corporation.* The

Honorable William B. Traxler, Jr., United States District Court Judge, spoke on "The Future in the Courts"; The Honorable Joseph F. Anderson, Jr., United States District Court Judge, Columbia, South Carolina, spoke on "Closing Arguments"; Former Chief Judge of the South Carolina Court of Appeals, Alexander M. Sanders, Jr., spoke on "Ethics Beyond the Code"; and University of South Carolina Law Professor, John P. Freeman, Esquire, spoke on "Ethical Considerations". From a further brief review of the program and the fifteen (15) presentations listed, other than Mr. Butler's presentation entitled "The Facts Behind the $100M Verdict" (Butler's materials were not included in the printed program materials), only three (3) of the fifteen (15) presentations appear to deal with automobile litigation at all. Those are entitled: "Automobile Restraint Systems" presented by Mr. Michael S. Cohen, Esquire, Miami, Florida; "Recognizing, Developing and Presenting the Crash-Worthiness Case", presented by J. Kendall Few, Esquire, Greenville, South Carolina; and "Update on Auto Insurance", presented by Eugene C. Covington, Jr., Esquire, Greenville, South Carolina.

Therefore, the seminar did not "focus heavily" on "pending side impact truck fire cases against General Motors". See, Program and Printed Materials, COURT'S EXHIBIT NUMBER ONE (1).

Further, I did not hear the presentation made by Mr. James Butler on Friday, December 3, 1993. My first exposure to Mr. Butler's presentation was in review of the attachments to General Motors' Motion for Recusal in this case. Additionally, I heard none of the other presentations, with the exception of those presented by Gedney M. Howe, III, Esquire, Judge William B. Traxler, Jr., and Judge Joseph F. Anderson, Jr.

Additionally, I neither organized nor "actively" participated in the organization of the program for the Auto Torts Seminar. I was approached by Terry Richardson, Esquire, Seminar Chairman, and asked to present a Continuing

Legal Education Session for the program. I agreed to do a presentation on several major decisions affecting civil litigation which came down during 1993. I had no input into the program.

My expenses were not paid by the South Carolina Trial Lawyers Association beyond the cost of my room. See Affidavit of Ms. Linda M. Franklin, Executive Director of the South Carolina Trial Lawyers Association. COURT'S EXHIBIT NUMBER TWO (2).

2. BIAS AND PREJUDICE AGAINST "AUTOMOBILE TORTS" AND "PRODUCTS LIABILITY" DEFENDANTS AS EVIDENCED IN THE DECEMBER 3RD, 1993 TALK.

As a frequent speaker, I have found that humor is an effective educational tool. By mischaracterizing statements patently intended to be humorous, the Defendant attempts to cast doubt upon the ability of this Court to render a fair and unbiased trial. The Defendant literally "cuts and pastes" statements from different portions of the speech, strategically placing them together in a manner designed to make the innocuous appear sinister.

The Defendant further represents in its Memorandum in Support of Defendant's Motion to Recuse and Vacate Orders that I was the "honored guest" at the SCTLA Conference. [Defendant's Brief at page 3]. However, a review of the very first page of the conference materials at the bottom of the page reveals that the "honored guest" was Richard J. Foster, "one of the founding members and our President Emeritus."

General Motors asserts that I delivered a speech to the SCTLA Legal Seminar audience that "denigrated automobile tort defendants, defense attorneys, and defense expert witnesses" [General Motors' Memorandum, p. 7], based on isolated remarks extracted out of context from my speech.

Any reasonable person listening to the audio tape of my speech could not believe that any comments made in the course of my presentation were intended to be anything other than humorous.

The Defendant attempts to fabricate "bias or prejudice" against defendants and defense attorneys by pulling sentences out of context and ignoring the humor that was intended.

The first portion of my talk dealt with computer animation as demonstrative evidence. The second segment of my presentation dealt with the United States Supreme Court decision, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786 (1993), which I characterize as arguably the most significant scientific evidence decision in the history of the Federal Rules of Evidence. The decision holds that a defendant will no longer be entitled to summary judgment because the plaintiff's expert's opinion is not "generally accepted" by the scientific community. I further pointed out in the seminar materials that the Supreme Court listed a number of factors to be considered by the trial judge before allowing scientific opinion to be considered by a jury.

The third segment of my seminar presentation dealt with punitive damages and the United States Supreme Court decision in *TXO Production Corporation v. Alliance Resources Corporation*, 509 U.S. 443, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993). I commented on the consistent practice of some defendants and defense counsel to file repeated motions challenging the constitutionality of punitive damages ignoring the United States Supreme Court ruling in *Pacific Mutual Life Insurance Company v. Haslip*, 499 U.S. 1, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991). This Court is besieged with "canned" motions seeking to have punitive damages declared unconstitutional and I do, in fact, use a "canned" order to deny these frivolous motions rather than expend the Court's time. The Court is under no legal obligation to grant a hearing on such motions.

As to my enjoyment of my profession, I make no

apologies. I enjoy my judicial role and I take great pleasure in presiding over a well tried case, whether by defendant or plaintiff, or both.

Again, if one listens to the audiotape of the presentation, it is clear that the comments and phrases, which the Defendant has taken out of context and which the Defendant relies on in support of its Motion for Recusal, were used only in a humorous vein and were clearly not indicative of the attitude which this Defendant has attempted to impute to me as evidencing a general attitude toward defendants and their attorneys. The true humorous intent can be gleaned from an exact quote of my remarks:

> But, you know, I just got back from the defense trial lawyers meeting in Sea Island, Georgia. *You know, most of those fellows are pretty nice.* (emphasis added). *They really are* (emphasis added), but some of them, you know, they have that puritanical attitude just that kills them. They think that somebody, sometime, somewhere, is actually enjoying themselves and it kills them. They can't stand it. And, you know, they're so pessimistic, you know they walk in a room, smell flowers and they start looking around for the casket. But, and while we were down there, you know, we all accept the fact that fish is brain food. You know what they serve three times a day at the defense lawyers? Whale. The only exercise—some of them gets, is stretching the truth--that's about all they ever get. But while I was there they nominated Terry, where is Terry? They gave Terry—I don't know whether it is an award or not—but they nominated him as the catcher for next year's olympic javelin team. That could or could not be an honor. I don't know.

Additionally, "the alleged bias" must derive from an extrajudicial source. It must result in an opinion on the merits on a basis other than that learned by the Judge from his participation in the matter. *United States v. Grinnell*

Corporation, 384 U.S. 563, 583, 86 S.Ct. 1698, 1710, 16 L.Ed.2d 778 (1966). The nature of the Judge's bias must be personal and not judicial. *Shaw v. Martin*, 733 F.2d 304, 308 (4th Cir. 1984). A judge is not disqualified because his familiarity with the facts of a case stem from his judicial conduct in presiding over earlier proceedings. *United States v. Parker*, 742 F.2d 127 (4th Cir. 1984). *In re Diana R. Beard, et al.*, 811 F.2d 818, 827 (4th Cir. 1987).

As to my congratulations issued to three plaintiff's attorneys for receiving the largest personal injury verdict in South Carolina history, Twelve Million Five Hundred Dollars ($12,500,000.00) in actual damages, I congratulate any and every attorney, both plaintiff and defendant, for a case well tried.

There was no bias or prejudice evidenced against automobile tort defendants, against products liability defendants, against any class of defendant, nor against any particular defendant in my presentation.

General Motors also makes much of my characterization of the plight of the defense attorney who, under the rules laid down in the Fourth Circuit for the handling of punitive damages, has to stand up in front of a jury which has just returned an actual damages verdict against a defendant and plead for mercy. While my descriptology might have been somewhat intemperate, the message I attempted to convey would have been both clear and less offensive had I utilized the adjective "poor."

3. ALLEGATIONS THAT THE COURT WAS EXPOSED EX PARTE TO A "PRE-SCREENING" OF THE PLAINTIFFS' CASE AND THAT MAJOR DISCOVERY ISSUES TO BE ARGUED TO ME LATER WERE "PREVIEWED" OUT OF THE PRESENCE OF GENERAL MOTORS' COUNSEL.

The Memorandum in Support of Defendant's Motion to Recuse and Vacate Orders, at page 5, asserts that attorneys for the plaintiffs in this case, in my presence and *ex parte*, offered their views on a wide range of issues concerning the side-impact truck fire cases in which General Motors is a defendant, "*including facts and arguments directly at issue in this case.*" (emphasis in the original). Also, a General Motors' staff attorney, Susan Mason, has submitted an affidavit to this Court which states "her belief" that no General Motors' lawyers were present in Atlanta at the SCTLA program.

The Affidavit of SCTLA Executive Director, Ms. Linda M. Franklin, attests to the attached List of Attendees at the meeting. See COURT'S EXHIBIT NUMBER TWO (2). A review of the list indicates that five (5) attorneys from General Motors' counsel, the Nelson Mullins Law Firm, were present: (1) Kemila C. Johnson; (2) Elizabeth Scott Moise; (3) John F. Kuppens; (4) Christopher McCool, and (5) Deidre M. Shelton.

John Kuppens is an associate in the Products Liability Section of the Nelson Mullins Firm and works directly for Mr. Morrison, lead local counsel in this case. Ms. Shelton, although listed as being in the Charleston office, has been an active participant in this litigation. See PLAINTIFFS' EXHIBIT NUMBER J.

At approximately 2:15 p.m. on Friday, February 25, 1994, some fifteen (15) minutes before the time the hearing on the Defendant's Motion to Recuse and Vacate Orders was scheduled to begin, the Defendant had delivered to this office five (5) new affidavits which had been filed as of this date. Although untimely, I have still considered these affidavits.

Further, my presentation was from 9:00 a.m. to 9:45 a.m. on Friday morning, December 3, 1993. Following the completion of my talk, I shook hands with several people, left the room, and went out into the hallway. See Affidavit of The Honorable H. Dean Hall, COURT'S EXHIBIT NUMBER THREE (3); Affidavit of John A. Hagins, Jr., COURT'S EXHIBIT NUMBER FOUR (4); Affidavit of Gedney M.

Howe, III, Esquire, COURT'S EXHIBIT NUMBER FIVE (5); Affidavit of Judith A. Leatherwood, Esquire, COURT'S EXHIBIT NUMBER SIX (6); Affidavit of William M. Grant, Jr., Esquire, COURT'S EXHIBIT NUMBER SEVEN (7); and COURT'S SUPPLEMENTAL EXHIBIT NUMBER ONE (1), the Affidavit of Linda M. Franklin, dated February 21, 1994.

I did not hear the presentation made by Attorney James Butler. Nor did I hear the presentation made by Attorney J. Kendall Few from 4:45 p.m. to 5:30 p.m. on Friday, December 3, 1993. I did return to the lecture hall minutes before the conclusion of Mr. Few's address, stuck my head in the door, saw that the program was still underway, stood a few moments, and left the room on the way to a social event in a room across the hall from the lecture hall.

Defendant has asserted to this Court and references, at pages 5-7 in its Memorandum, the following specific "issues" allegedly "previewed" and "pre-screened" *ex parte* by Plaintiffs' attorneys, in my presence, i.e.,:

(1) General comments on the *Moseley v. General Motors Corporation* case tried in Georgia by Mr. James Butler and the Defendant's attempts to hide evidence.

(2) Allegations of document destruction including reference to young lawyers employed by the Defendant from regional defense firms around the country who supposedly went to Detroit to go through General Motors' engineers' files, and to shred documents "that might be misinterpreted," as well as reference to a deposition of a General Motors' engineer that Defendant's lawyers carted away box loads of documents to be shredded;

(3) Allegations of twenty-four (24) crash tests and twenty-four (24) failures and calculated discovery abuse employed in the Moseley case by the Defendant;

(4) The order of this Court requiring the Defendant to produce a Privilege Log disclosing that one of Defendant's lawyers from King and Spaulding had reported on Mr. Butler

and a talk that he had made at a seminar; and

(5) "A foretaste" of the Plaintiffs' position on the merits by raising arguments presented in the Moseley case that "would soon have to be considered again in Cameron." The Defendant's Memorandum makes the representation that in the presence of the Judge," Mr. Butler asserted that the Defendant's engineers had opposed the fuel tank design.

A review of the record in this case reveals the following:

A hearing was held before me in this case on September 20, 1993 on the Plaintiffs' Motion to Compel Responses to Interrogatories at which time I advised both parties that it was "going to cost somebody a hundred dollars per interrogatory ... so it is going to cost. If you're wrong on them, a hundred dollars per interrogatory." [9-20-93 Hearing Transcript, p. 3, 1. 7-13].

I further advised counsel for both plaintiffs and General Motors: "Well, if it is proved that they (plaintiffs) are asking for something and they are insisting on it, then I'm going to make them pay for it. As I say, gentlemen, I am sick and tired of making a judicial career of such trivia. And I'm going to put a stop to it. So when you raise an objection or when you ask for something, you better know what you're doing. I'm going to take care of it. It is going to be a two-edged sword. It's going to cut both ways." [9-20-93 Hearing Transcript, p. 12, 1.. 22--p. 13, 1. 4].

The plaintiffs were advised that they would pay for the production and copying and transport of documents from Detroit to South Carolina at "a reasonable rate per page." [9-20-93 Hearing Transcript, p. 15, 1. 1-12].

I then advised the Plaintiffs' attorneys, "And if you want to insist on all of these tons of documents, then you're doing to have to pay for it. And if you make a request which I deem unreasonable, then you're going to have to pay the fine. If he refuses, he's (Defendant's counsel) going to pay the fine.

But it is a hundred dollars per interrogatory. And if they can be produced, they are going to be produced at a cost of whatever I determine per page, per copy." [9-20-93 Hearing Transcript p. 21, 1. 10-20].

Over two-thirds of this hearing concerned the production of the Defendant's Crash Test Log maintained by the Defendant on all crash testing performed by the Defendant, and specific crash test reports.

During this hearing, the Plaintiffs' attorneys represented that General Motors' employees had, in the 1970s, discussed "how a prop shaft can penetrate a fuel tank if it is located between the frame rail." [9-20-93 Hearing Transcript. p. 20, 1. 11-15]

It was during this hearing that the Moseley verdict was first discussed in this Court. The Plaintiffs' lawyers stated: "The Moseley verdict was the case in Atlanta where the jury gave One Hundred Million in punitive damages to the Moseleys against General Motors involving a side-saddle pickup truck." [9-20- 93 Hearing Transcript, p. 22, 1. 7-10].

The next hearing in this case held before me was on October 12, 1993, which again concerned purported discovery abuses by the Defendant.

During this hearing, Plaintiffs' attorneys disclosed to the Court the existence of a directive issued by a General Motors' truck engineer named Mair that stated "Fuel tanks must be mounted outside the cab and as close to the center of the vehicle as practical," [10-12-93 Hearing Transcript, p. 8, 1. 6- 11]; and a second General Motors' truck engineering memorandum stating "Moving these side tanks inboard of the frame might eliminate most of these potential leakers." [10-12-93 Hearing Transcript, p. 8, 1. 12-14].

At this time, General Motors had never objected to specific document production requests on grounds of attorney-client privilege. [10-12-93 Hearing Transcript, p. 10, 1. 13--p. 11, 1. 1].

It was during this same hearing on October 12, 1993, some six (6) weeks prior to the speech given by Mr. James Butler, that Plaintiffs' counsel stated:

Mr. John Few: In the early 1980's, I'm not sure exactly when, the process of responding to discovery in these GM truck cases was taken over by the GM Legal Department from the Engineering Department. So whenever it was in the early 1980's, when there was a discovery request made in a case, the Legal Department was answering the request. In addition, you remember when we discussed at the last hearing the Legal Department came to the office of an engineer named Kashmerick who had kept all of the relevant documents on GM trucks and they said, "Give us all your documents." And according to Kashmerick's testimony in his deposition in a previous case, they destroyed them all except for about two briefcases full that they took off and he never saw again.

So the Legal Department has been intimately involved in the evaluation of what happens with these GM trucks. We are not looking for things where they're talking about how to defend a lawsuit. We're looking for situations where the Legal Department is involved in whether to recall the trucks, whether to change the design of the trucks, and that kind of thing. And I think we're entitled to that. [0-20-93, Transcript Hearing, p. 11, l. 14–p. 12, l. 11].

With respect to a pre-screening of the "twenty-four (24) crash tests, these tests were disclosed and argued in this very same October 20, 1993 hearing, and Plaintiffs' attorney stated:

Mr. John Few: We just have two more. In Mark Cameron's case, Request Number 3, a similar situation. There is a GM former engineer and a former expert witness for GM in these pickup truck cases who has left GM and testified for the Plaintiff in the Moseley case down in Atlanta earlier this year as a result of—as I understand it, as a result of being misled by GM as to whether or not some crash tests were done on these pickup trucks and being sent to San Francisco in 1983 to testify in favor of the GM design when GM had done some

crash tests, 23 crash tests, in which the gas tanks—as he said, "Split open like melons." And he was not told about those tests until after the trial. He testified as an expert and as a witness for the Plaintiff.... Okay, Your Honor. The witness's name is Mr. Elwell, a former GM....

The Court: Ronald Elwell.

Mr. John Few: Yes, sir, a former GM engineer and testified as an expert for GM in these truck cases, including one in 1983 in San Francisco which he was specifically asked by the Judge out there whether GM had produced all of the crash tests. He responded, "Yes," because he thought that was a correct answer. When he got back to Detroit, his superior said, "You might ought to go out there on the proving ground and see some of the stuff we have been doing." And he went out there and he found 24 crashed GM pickup trucks that he had never been told about, each of which, as he said as I understand it, had gas tanks that were split open like melons. He then dropped out of the scene on behalf of GM and ultimately came to testify for the plaintiff in the trial, down in Atlanta earlier this year in which there was a hundred million dollar verdict rendered. In that case, General Motors produced to the Court, and this is in the Atlanta trial, five boxes of documents that were taken from Elwell at some point and the Court never got a chance to rule on them because they produced them so late that the trial got started. But anyway, they still haven't been produced to any plaintiff. And those are the documents we're looking for. We got supplemental answers on Friday that indicated that they are going to provide 400 pages out of those five boxes, but the rest of them, they won't produce them. They haven't given us a privileged log on any of that stuff. These are Ron Elwell's personal files that he kept in the course of his work as a truck engineer at GM. I'm not sure exactly how it happened, but my understanding is that at a deposition, in a lawsuit between Mr. Elwell and GM, the documents were taken by GM and claimed to be privileged. So Mr. Elwell doesn't have copies of them. [10-12-93 Hearing Transcript, p.

21, l. 14--p. 23, l. 18].

It should be noted that the Kashmerick deposition, which discloses document destruction by General Motors' lawyers, "shredding" of documents, and the "carting" away of documents to be shredded, discloses the "facts" the Defendant would have this Court believe were "previewed" in Mr. Butler's alleged ex parte presentation on December 3, 1993 to this Court, was filed with this Court on July 21, 1993 as Exhibit F to the Brief in Support of Plaintiffs' First Motion to Compel General Motors to Respond to Plaintiffs' First Document Requests and First Interrogatories in the Mark Cameron Case, C/A No. 6:93-1278- 3, and was a part of the record in this case for some four (4) months prior to the seminar in Atlanta on December 3, 1993.

Although I was not present for the speech given by Mr. James Butler, nor was I present for the speech given by Mr. Kendall Few, it is patently clear that there was neither a "pre-screening" nor a "preview" of any allegations concerning (1) concealment of evidence; (2) destruction of documents; (3) the use of young lawyers from General Motors' regional defense firms to go through General Motors' documents and shred those documents inimical to General Motors' interests; (4) the twenty-four (24) crash tests of General Motors' side trucks; (5) opposition by General Motors' truck engineers to the truck's design; (6) the Kashmerick deposition and his testimony that General Motors' lawyers destroyed all of his relevant documents with the exception of two (2) briefcases full which they took; or (7) the former General Motors' Engineer Ron Elwell's testimony in the Moseley case that General Motors' performed some twenty-three (23) crash tests on the trucks in which the gas tanks "split open like melons."

All of the facts and issues which General Motors misrepresents were "previewed" and "pre-screened" in ex parte communication by Mr. Butler and Mr. Few in Atlanta on December 3, 1993 in their speeches, were already a part of the record in this case. Additionally, since there were five (5)

attorneys from the Nelson Mullins Law Firm, local counsel for General Motors, any communication could hardly have been ex parte. At least one, Ms. Shelton, has apparently actively participated in this case by taking ten (10) depositions for General Motors and participated in a vehicle inspection in this case representing General Motors.

If Defendant had conducted an "objectively reasonable investigation" of the facts and record in this case, these allegations of "preview" and "pre- screening" could not have been made.

4. ALLEGED COMMENTS MADE DURING AN EX PARTE CONVERSATION WITH ONE OF DEFENDANT'S YOUNG LOCAL ATTORNEYS CONCERNING THE SCHEDULING OF AN EXPEDITED HEARING:

Plaintiffs' attorneys filed a Motion for Sanctions for Discovery Abuse Relating to the GM Privilege Logs Required by the Court's Discovery Order of October 27, 1993 on December 8, 1993.

Plaintiffs' counsel called my secretary, Ms. Darlene Hopper, and requested that an expedited hearing be scheduled as soon as possible since the Plaintiffs' Motion for Sanctions concerned the very same issues that had been involved in prior Motions to Compel Responses to Interrogatories and Document Production and discovery disputes previously heard by this Court in September and October, 1993. After consulting with me, Ms. Hopper set the motion hearing for Friday, December 10, 1993 at 9:30 a.m. Ms. Hopper informed Plaintiffs' attorney and Defendant's counsel advising them of the hearing.

Subsequently, Mr. Joel H. Smith, one of the attorneys representing the Defendant called Ms. Hopper or one of my law clerks on the telephone and requested to speak to me.

My recollection of a conversation and that of Mr.

Smith's is vastly different. Having been a friend of Mr. Smith's deceased father, I inquired about Mr. Smith's unprecedented hostility and intemperate tone,[2] to which Mr. Smith responded that this was a very important case, the most important case he had ever had, and that his career depended on this case and its outcome. I reminded Mr. Smith of how, when he had brought his ten (10) year old daughter to my courtroom several months before, I had stopped proceedings, given her a personal guided tour of the court house, and then presented her with a United States Marshal's badge.

I recall no efforts by Mr. Joel H. Smith at conciliation, but only a hostile and aggressive demand that this Court cancel the hearing. I never made the statement that Mr. Smith's law firm needed to "get on the right track" in this case, or stated that "someone is going to pay," nor did I make the statement, "It's the whole law firm." I do recall and the record reflects that this is precisely what I said to both plaintiffs' counsel and defendant's counsel during the course of the September 20, 1993 hearing. I ruled with respect to interrogatories "... *it is going to cost somebody* (emphasis added) a hundred dollars per interrogatory. I am tired of just putting up with hearings every time this court house door is open. Nobody is answering interrogatories anymore. *So it is going to cost.* (emphasis added). If you're wrong on them, a hundred dollars per interrogatory." [9-20-93 Hearing Transcript, p. 3, l. 7-13].

I refused to accede to Mr. Smith's strident demand that the expedited hearing be rescheduled.

The hearing held on Friday, December 10, 1993 involved expedited ongoing discovery disputes in this case and the Plaintiffs' Motion for Sanctions. However, no Order was issued with respect to the issues dealt with in that hearing until

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[2] Mr. Smith's excitable and hostile nature was again demonstrated when the Court took a ten minute recess so that Mr. Smith could compose himself and collect his emotions and thoughts. (Transcript of hearing December 17, 1993, page 82).

January 10, 1994.

When I ordered the Defendant to produce crash test results, I also advised both Plaintiffs and the Defendant: "Produce them within 48 hours and if the Court decides after the production that they were withheld unnecessarily or unreasonably, it will be a one hundred dollar fine. If the request from the Plaintiff appears to be unreasonable in view of what you have told the Court, then the Plaintiffs will pay a one hundred dollar fine." [9-20-93 Hearing Transcript, p. 10, l. 7-13].

At page ten (10) of Defendant's Memorandum in Support of the Motion to Recuse and Vacate Orders, Defendant by innuendo attempts to impugn the integrity of this Court by stating "in a footnote" their "reason to believe" that the scheduling of the December 10, 1993 hearing had been discussed with Plaintiffs' counsel by the Court prior to December 8, 1993.

Again, no "objectively reasonable inquiry" was made by Defendant's counsel prior to making this allegation. The Affidavit of Lee Tarte clearly explains her cancellation of a discovery conference and dispels Defendant's "hint" of *ex parte* communication between Plaintiffs' counsel and this Court.

The only ex parte contact by either party has been made by Defendant's attorney, Joel H. Smith.

The only sanction issued against either party has been against the Plaintiffs.

5. SCHEDULING AN EXPEDITED HEARING AND REFUSAL TO ALLOW DEFENDANT'S ATTORNEYS SUFFICIENT TIME TO RESPOND TO PLAINTIFFS' MOTION FOR SANCTIONS BASED ON DEFENDANT'S FAILURE TO COMPLY WITH PRIOR COURT ORDERS:

At the very beginning of the hearing I allowed Mr. Joel H. Smith to file and rely on "Fax" copies of affidavits based on his representation that he had been unable to obtain originals. These were affidavits supporting the Defendant's claims of attorney-client privilege with respect to certain documents.

I further ruled that although Mr. Smith's motion to extend the time for the hearing was denied, that "If there's anything that requires additional time, though, and I think you need it, I'll be glad to grant it." [12-10-93 Hearing Transcript, p. 4, 1. 19-25].

After a lengthy hearing, I ruled that the Motion for Sanctions was held in abeyance. [12-10-93 Hearing Transcript, p. 101, 1. 11-12].

Defendant argues that this Court should be disqualified because of personal bias against its attorneys and cites In re Beard, 811 F.2d 818, 830 (4th Cir. 1987). In that case, Circuit Judge Widener, writing for the panel (composed of additional Judges Russell and Chapman) held:

> Belatedly, petitioners claim that at one of these ex parte meetings Judge Merhige called Attorney Bradley Post a "son-of-a-bitch" and a "wise-ass" lawyer, thus showing the Judge's bias against Mr. Post. Bias against an attorney is not enough to require disqualification under § 455 unless Petitioners can show that such a controversy would demonstrate a bias against the party itself. (citations omitted); for the bias against the attorney to require disqualification of the

trial judge, it must be of a continuing and personal nature and not simply bias against the attorney because of his conduct. (citation omitted). Antipathy to an attorney is insufficient grounds for disqualification of the judge. (citation omitted). While the district court's comments were ill-advised, those remarks alone do not require disqualification. *In re Beard, supra*, at 817-818.

The scheduling of the expedited hearing for December 10, 1993, does not show a bias "of a continuing and personal nature" so as to require recusal under 28 U.S.C. § 455.

6. THE COURT'S RULE TO SHOW CAUSE PURSUANT TO RULE 11 OF THE FEDERAL RULES OF CIVIL PROCEDURE.

Defense attorneys argue that the Court's Rule 11 inquiry filed on January 28, 1994 further evidences bias "as a continuing and personal nature" since it was filed despite the mandates of 28 U.S.C. § 144. However, the Motion for Recusal was filed on January 18, 1994. The Memorandum accompanying the motion contains extremely serious and unsupported allegations. The motion, as originally filed, clearly failed to meet the legal requirements of 28 U.S.C. § 144. The motion was filed with two affidavits by local defense counsel, neither of which asserted any personal bias or prejudice as to the party defendant. Nor was the recusal motion and supporting memorandum accompanied at filing by the statutorily mandated Certificate of Good Faith of Counsel.

Only after the Court's notice of Rule 11 inquiry did local defense counsel attempt to rectify the deficiencies in the filing under 28 U.S.C. § 144 by filing a Certificate of Good Faith of defense counsel attached to its Reply Memorandum on February 3, 1994. The Certificate of Counsel was and remains deficient. It was never filed with the affidavit of a party, only certifies that the Affidavits accompanying the Motion, i.e., those of Mr. Morrison, Mr. Smith, and Ms. Quintana were filed

in good faith. The Certificate also fails to allege that the attorney believes the facts asserted in any affidavit to be true. No mention of good faith is asserted as to the fourth Affidavit of General Motors' staff lawyer, Susan E. Mason, filed on January 21, 1994.

> RULE 11. SIGNING OF PLEADINGS, MOTIONS, AND OTHER PAPERS; REPRESENTATIONS TO COURT; SANCTIONS. (a) SIGNATURE. Every pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party. Each paper shall state the signer's address and telephone number, if any. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party. (b) REPRESENTATIONS TO COURT. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,— (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law; (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and (4) the details of factual

contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

Under Rule 11, the signature of a party or attorney constitutes a certificate that the signer believes that after reasonable inquiry, 1) the pleading or motion is well grounded in fact; 2) the pleading or motion is warranted by existing law; and 3) the pleading or motion is not presented for any improper purpose. *Perkins v. General Motors Corporation*, 129 F.R.D. 655, 658, *aff'd*, 965 F.2d 597 (8th Cir. 1992).

The attorney need not even act in subjective bad faith or with malice to trigger a violation of Rule 11. *Adduono v. World Hockey Ass'n*, 824 F.2d 617, 621 (8th Cir. 1987).

Rather, an objective standard applies and the party or his attorney cannot argue "that their subjective 'good faith' (i.e., ignorance of the law or legal procedures) somehow excuses their actions. *Kurkowski v. Volcker*, 819 F.2d 201, 204 (8th Cir. 1987).

Rule 11 "was designed to prevent abuse caused not only by bad faith but by negligence and, to some extent, by professional incompetence." *Gaiardo v. Ethyl Corporation*, 835 F.2d 479, 482 (3rd Cir. 1987). See Rule 11 Advisory Committee Note, 97 R.F.D. at 198.

As stated by another district court judge: A motion to recuse a judge is not just another procedural or evidentiary motion. It is a direct attack on one of the basic principles of our judicial system, the impartiality of the trial court.... But the obligations which respondents owed to their clients does not answer the dilemma. It merely states the dilemma. The other side of the dilemma is that defense attorneys are also officers of the court and owe duties, to the administration of justice. In re Order to Show Cause, 741 F.Supp. 1379, 1381 (N.D.Cal. 1990).

Two federal cases concerning false accusations against judges have arisen from civil cases and involved Rule 11. In

In re Kelly, 808 F.2d 549 (7th Cir. 1986), the appellate court defined the duties of counsel to require the making of inquiry and further required attorneys to be scrupulous regarding the accuracy of their statements. Another case, *Mair v. Orr*, 758 F.2d 1578 (Fed.Cir. 1985), defined the duty in terms of reasonable inquiry.

Rule 11 demands that an attorney conduct an "objectively reasonable investigation" of the facts supporting a claim before it is filed. *Cleveland Demolition Company, Inc. v. Azcon Scrap. Corporation*, 827 F.2d 984, 987 (4th Cir. 1987). The proper inquiry is whether "a reasonable attorney in like circumstances would believe his actions to be factually and legally justified." *Cabell v. Petty*, 810 F.2d 463, 466 (4th Cir. 1987). Counsel cannot have held this belief.

The counsel of record in these cases have fallen far short of the requirements of their ethical and professional responsibilities. A reasonable inquiry was not made into the facts asserted in the Motion to Recuse and the Affidavits nor were counsel scrupulous regarding the accuracy of their statements in the supporting memorandum as evidenced by the record in this matter.

The fact that a judge *sua sponte* issues a Rule to Show Cause pursuant to Rule 11(c)(1)(B) of the Federal Rules of Civil Procedure indicates no bias requiring his disqualification. *Lemaster v. United States*, 891 F.2d 115, 120-121 (6th Cir. 1989). Clearly, this is a judge's duty and responsibility.

Additionally, the recusal motion was untimely. Defense counsel has fully participated without objection in three (3) hearings on December 10, 1994, December 17, 1994, and December 22, 1994, and only filed its Motion for Recusal on January 18, 1994.

III. DEFENDANT'S MOTION TO VACATE THIS COURT'S ORDERS DATED DECEMBER 30, 1993.

Defendant has filed a Motion (1) for an Order Recusing the Court in this case pursuant to 28 U.S.C. § 144 and 28 U.S.C. § 455(a), and (2) for an Order Vacating this Court's Orders based on hearings on December 10, December 17, and December 30, 1993.

As noted above, grounds alleged are: (1) exposure to alleged extended ex parte arguments during a legal education seminar by attorneys representing Plaintiffs in this case regarding issues to be heard the following week; (2) a public attack on the veracity and integrity of automobile tort defendants, defense attorneys, and praise for plaintiffs' attorneys and pro-plaintiff product liability decisions; and (3) denial of time for Defendant's counsel to respond to a Motion for Sanctions filed by Plaintiffs relating to ongoing discovery abuse by the Defendant. Defendant relies on this third ground in support of its Motion to Vacate Orders, specifically, the five (5) Orders of this Court relating to hearings held on December 10, 1993, December 17, 1993, and December 22, 1993, one of which Orders required the Defendant to produce fifteen (15) documents and one "partial" document from the Defendant's "Privilege Log," which had been submitted for in camera review, from the twenty-three (23) documents for which attorney-client privilege was claimed. All five (5) Orders are, in fact, dated December 30, 1993.

It should be noted that on December 21, 1993, defense counsel had still failed to comply with the Court's Order of October 1993 that designated documents from the Legal Files Privilege Log be submitted to the Court for *in camera* review. The designation of these documents was Exhibit C to the Plaintiff's Motion heard on December 10, 1993. To my utter amazement, defense counsel asserted that he had not realized that the Court wished these documents submitted. The Court instructed Defendant's attorneys to produce these documents

for an in camera review by the next day and to produce a privilege log on other documents on which counsel was asserting an attorney-client privilege. Again, Defendant fully participated in this hearing, made no objection to the Court's review, and gave no notice of Defendant's desire for the Court's recusal.

A review of these documents submitted on December 22, 1993 supports the Plaintiffs' position of possible document destruction and perjury as argued on several previous hearings. [Submitted as part of the record to the Fourth Circuit without objection by Defendant from the hearing held January 25, 1994.].

A review of the thousands of documents in this case including *in camera* reviews of documents for which an attorney-client privilege was asserted reveals a substantial likelihood that perhaps perjury and the systematic destruction of documents involving gross misconduct by General Motors' regional counsel occurred. Evidence of the commission of such activity by and with the knowledge of these General Motors' regional counsel would defeat the attorney-client and work-product privilege asserted by General Motors. There is clearly evidence having a sufficient foundation in fact to establish a prima facie case that the documents for which an attorney-client privilege is asserted are subject to the crime-fraud exception.

With respect to my Order referring to the hearings held on December 17 and December 21, 1993, following the earlier hearing on December 10, 1993, the Court allowed Plaintiffs' counsel to take the depositions of certain outside regional counsel and General Motors' employees concerning the "document sweep" and the systematic destruction of documents.

As noted, Exhibit F to the July 21, 1993 Brief in Support of Plaintiff's First Motion to Compel General Motors to Respond to Plaintiffs' First Document Requests and First Interrogatories is a portion of the deposition of an assistant

staff engineer for General Motors, Mr. Kashmerick. His testimony is clear that General Motors' Legal Department "went through all my file cabinets and took every damn thing they thought was a problem." [Kashmerick deposition, p. 23, 1. 22--p. 24, 1. 11]. When asked about participants in the "document sweep", Mr. Kashmerick identified the General Motors' legal staff. [Kashmerick deposition, p. 29, 1. 8--p. 30, 1. 4]. Mr. Kashmerick was asked about contact with General Motors' legal staff and documents. He stated: "Yeah. I gave them to the legal staff through these people that worked in their department." [Kashmerick deposition, p. 31, 1. 14-20]. Mr. Kashmerick further stated: "Those papers were all put in a great big trash bin right outside my office in the hallway and the guy was given strict instructions by the legal people. Take them downstairs and put those in the shredder and we're going to take these with us. They had two briefcases full. These wide briefcases. They had two briefcases full of papers that they took and they were going to look over more carefully." [Kashmerick deposition, p. 34, 1. 11-25].

Defense counsel submitted a Brief in Support of the Motion for Affidavit of Privileges. Additionally, General Motors' defense counsel, Mr. Joel H. Smith, was given the opportunity at the hearing on December 17, 1993, to respond to Plaintiffs' Motion to Take the Depositions of General Motors' Outside Regional Counsel involved in the "Document Sweep" and possible document destruction. [12-17-93 Hearing Transcript, p. 60, 1. 7-19].

Defense counsel have defended the attorney-client privilege by submitting affidavits from former regional attorneys who were alleged to know about the "document sweep" and document destruction. Argument was heard from Mr. Smith who was given an additional four (4) days to further supplement his position and defend his assertion of the claimed asserted attorney-client privilege as to documents and the depositions of outside regional counsel and employees.

CONCLUSION

The Court has reviewed the cases cited by the Defendant in support of the Motion to Recuse and to Vacate Orders and finds them to be easily distinguishable from the current case.

For example, in In re: School Asbestos Litigation, 977 F.2d 764, amended, 24 Fed.Rules Serv.3d 39 (3rd Cir. 1992), the judge attended a conference sponsored by the plaintiffs on a key merits issue and the conference was indirectly funded with court approved funds. The judge's expenses were largely defrayed by conference sponsors with those same court approved funds. Judge Kelly himself stated that he had been exposed to a Hollywood-style "pre- screening" of the plaintiffs' case and thirteen of eighteen experts retained by plaintiffs who were to testify at trial gave presentations reflecting their expected testimony. None of these facts exist in this case.

With respect to *United States v. Cooley*, 1 F.3d 985 (10th Cir. 1993), also relied upon by General Motors, the court states: "The statute (28 U.S.C. § 455(a)) is not intended to give litigants a veto power over sitting judges, or a vehicle for obtaining a judge of their choice." *Id.* at 993. In ruling on whether or not the district judge abused his discretion by denying defendants' Motion to Recuse under 28 U.S.C. § 455(a), the district judge's denial of the defendants' motion was upheld on every ground but one—the judge's appearance on and statements on the national network news program "Nightline". The concern of the Tenth Circuit was the judge's expressive conduct in choosing "to appear in such a forum at a sensitive time to deliver strong views on matters which were likely to be ongoing before him." *Id.* at 995. In the current circumstance, I did not appear in the national media. I did not "deliver strong views" on matters that were before me. My presentation addressed the admission into evidence of video animation and two (2) recent United States Supreme Court decisions, one relating to expert opinion and one relating to the

constitutionality of punitive damages. I expressed no views on any issue soon to be before me, i.e., discovery abuse, or any opinion on automobile design litigation.

The other cases cited by Defendant I also find inapplicable.

I FIND AS FACT THE FOLLOWING:

I find as a matter of fact the following:

(1) I find as a matter of fact that I did not hear the presentation by Mr. James Butler on Friday, December 3, 1993 from 9:45 a.m. to 10:30 a.m. entitled "The Facts Behind the $100M Verdict."

(2) I find as a matter of fact that I was not present for the presentation by Mr. J. Kendall Few from 4:45 p.m. to 5:30 p.m. on Friday, December 3, 1993, although I did return to the conference shortly before 5:30 p.m. to attend a social event and I did enter the Seminar Room as Mr. Few completed his speech. I heard nothing which even remotely related to the case *sub judice.*

(3) I find as a matter of fact that I was not subjected to an ex parte "preview" or "pre-screening" of important issues to be considered by me in subsequent hearings.

(4) I find as a matter of fact that there were five (5) members of the Defendant's South Carolina law firm in the audience, one of whom, Ms. Diedre Shelton, has actively participated in this case.

(5) I find as a matter of fact that following the SCTLA Seminar, Defendant fully participated in three (3) hearings on discovery abuse motions, one on December 10, 1993, a second hearing on December 17, 1993, and also on December 21, 1993. Plaintiffs made no objection nor advised the Court that Defendant planned to file its Motion to Recuse despite the fact that its attorneys had been in attendance at the SCTLA Seminar on December 3, 1993 and would have known then what was subsequently asserted as the basis for General

Motors' Motion to Recuse which was not filed until January 18, 1994.

(6) I find as a matter of fact that the Motion was untimely.

(7) I find as a matter of fact that I did not attend a predominately pro- plaintiff conference on any key merits issue.

(8) I find as a matter of fact that I was not the "honored guest" at the SCTLA Seminar and that I paid all of my own expenses with the exception of my hotel room, which I believe is paid for by the Association for all speakers.

(9) I find as a matter of fact that I was not exposed to a "pre-screening" of the Plaintiff's case or to facts pertaining to "key merits issues".

(10) I find as a matter of fact that there were no ex parte communications by Plaintiffs' attorneys with this Court. The only ex parte communication was by Defendant's attorney, Joel H. Smith.

(11) I find as a matter of fact that there is and has been no personal bias or prejudice expressed or implied as to the Party Defendant General Motors.[3]

(12) I find as a matter of fact that there is and has been no personal bias or prejudice, expressed or implied, of a continuing and personal nature as to the Defendant's attorneys.

(13) I further find as a matter of fact that although Defendant's Motion to Recuse is only based on 28 U.S.C.

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[3] In 1977 I successfully represented Thomas Murphy, Chairman of the Board and CEO of General Motors who had been noticed to testify in a case involving the alleged switching of vehicle engines of a Chevrolet engine to an Oldsmobile. See S.C. Court Docket No. 77-CP-04-273.

§ 455(a), that no alleged personal bias derived from an extra-judicial source, or otherwise, exists as to either the Defendant or Defendant's attorneys.

(14) I find as a matter of fact that the Court's sua sponte Notice of Rule 11 Inquiry demonstrates no personal bias or prejudice as to defense counsel. Defense attorneys filed a Motion for Recusal on January 18, 1994 asserting 28 U.S.C. § 144 and 28 U.S.C. § 455(a). The Motion for Recusal and the accompanying Memorandum made extremely serious and untrue allegations accompanied by innuendo and unsupported statements made without inquiry reasonable under the circumstances. The Motion under 28 U.S.C. § 144 as filed was legally insufficient as well as untimely. The Motion was not filed accompanied by the affidavit of a party, but rather with two (2) affidavits of local defense counsel, neither of which asserted any bias or prejudice as to the Defendant. Nor was the Motion accompanied at filing by the required Certificate of Good Faith by Local Counsel asserting that he believed the facts alleged to be true. As originally filed, and as it existed at the time of this Court's Rule 11 Notice, that Motion clearly did not meet the requirements of 28 U.S.C. § 144. The deficiencies in the recusal motion remain uncorrected to this day in spite of belated efforts by counsel to rectify its shortcomings.

(15) I further find as a matter of fact that the tenets of the Judicial Code of Ethics were not violated by this Court.

CONCLUSIONS OF LAW

Defendant General Motors asserts its Motion for Recusal under 28 U.S.C. § 455(a) as the basis for its Motion for Recusal. 28 U.S.C. § 455(a) states the following: (a) Any ... judge shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

Although not asserted as a ground for recusal by Defendant in its Motion, 28 U.S.C. § 455(b) states: (b) He shall also disqualify himself in the following circumstances: (1) Where he has a personal bias or prejudice concerning a party,

or personal knowledge of disputed evidentiary facts concerning the proceeding; ....

Disqualification is only required if a reasonable factual basis exists for doubting the judge's impartiality. *Rice v. McKenzie*, 581 F.2d 1114, 1116 (4th Cir. 1978).

In determining whether a district judge is to be disqualified under 28 U.S.C. § 455(a), which requires a judge to recuse himself "in any proceeding in which his impartiality might be questioned," the issue is whether an objective, disinterested observer fully informed of the facts underlying the grounds on which recusal is sought would entertain significant doubt that justice would be done in the case. *Union Carbide Corporation v. U.S. Cutting Services, Inc.*, 782 F.2d 710 (7th Cir. 1986); *U.S. v. Louhelia*, 454 F.2d 811 (2nd Cir. 1992); *Parker v. Connors Steel Company*, 855 F.2d 1510 (11th Cir. 1988), *rehearing denied*, 864 F.2d 795, *cert. denied*, 109 S.Ct. 2066, 490 U.S. 1066, 104 L.Ed.2d 631 (1989).

Additionally, a judge's impartiality must be judged, for recusal purposes, from the prospective of a reasonable, uninvolved observer, in light of the full record, and not simply in light of an isolated incident. *In re: Wirebound Boxes Anti-Trust Litigation*, 724 F.Supp. 684 (D.Minn. 1989).

In determining whether to disqualify himself on grounds of, among other things, that his impartiality might reasonably be questioned, a judge is to take into consideration all of the circumstances, both those in public and hidden view, and determine if a reasonable uninvolved observer would determine that his partiality might be questioned, and in making such an assessment the judge is not limited to those facts presented by the challenging party as he would be in a motion under 28 U.S.C. § 144, i.e., disqualification by way of a legally sufficient affidavit asserting personal bias or prejudice, nor must the judge accept any of the asserted facts as true. *State of Idaho v. Freeman*, 507 F.Supp. 706 (D.C.Idaho 1981); *Phillips v. Joint Legislature Com., etc.*, 637 F.2d 1014, 1019 n. 6 (5th Cir. 1981), *cert. denied*, 456 U.S.

960, 971, 102 S.Ct. 2035, 2233, 72 L.Ed.2d 483, 845 (1982); *In re Beard*, 811 F.2d 818, 827 (4th Cir. 1982).

While I can discern little direct charge of personal bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts, and although the Defendant's motion is made pursuant to 28 U.S.C. § 455(a), I will, from an abundance of precaution, also address 28 U.S.C. § 455(b).

"The alleged (personal) bias or prejudice (concerning a party), must derive from an extra-judicial source. It must result in an opinion on the merits on a basis other than that learned by the judge from his participation in the case before him. *United States v. Grinnell Corporation*, 384 U.S. 563, 583, 86 S.Ct. 1698, 1710, 16 L.Ed.2d 778 (1966). The nature of the judge's bias must be personal and not judicial. *Shaw v. Martin*, 733 F.2d 304, 308 (4th Cir. 1984). A judge is not disqualified because his familiarity with the facts of a case stem from his judicial conduct in presiding over earlier proceedings. *United States v. Parker*, 742 F.2d 127 (4th Cir. 1984)." *In re Beard*, 811 F.2d 818, 827 (4th Cir. 1987).

AS A MATTER OF LAW I FIND THE FOLLOWING:

1. I find as a matter of law that Defendant's Motion is premised on 28 U.S.C. § 455(a), although Defendant's Memorandum and Reply Memorandum in Support of its Motion to Recuse and Vacate Orders argues and cites 28 U.S.C. § 455(b).

2. I find as a matter of law that I was not exposed to any ex parte evidence or argument by Plaintiffs at the South Carolina Trial Lawyers Association Conference with any resulting bias or prejudice as to a party.

3. I find as a matter of law that my remarks in the course of my continuing legal education presentation at the Conference demonstrate no personal bias or prejudice against the Defendant, General Motors (as would be mandated by 28 U.S.C. § 455(b).

4. I find as a matter of law that my Order for an expedited hearing pursuant to Plaintiff's Motion for Sanctions relative to allegations of ongoing and continuous discovery abuse by the Defendant also demonstrates no personal bias or prejudice against the Defendant or Defendant's counsel. I point out that I allowed defense counsel to file and rely on "fax" affidavits, and advised defense counsel that additional time to respond would be granted if needed. I also point out that no sanctions were implemented and that I placed Plaintiffs' Motion for Sanctions against the Defendant in abeyance.

5. I find as a matter of law that this Court has no bias against any attorney or defense counsel to require disqualification; I further find that there is no bias against any attorney or defense counsel of a continuing and personal nature.

6. I find as a matter of law that the scheduling of an expedited hearing is not sufficient to establish grounds for recusal. Scheduling is within the realm of judicial case management which is left to the discretion of the trial court and which does not provide a basis for recusal. *Johnson v. Trueblood*, 629 F.2d 287, 291 (3rd Cir. 1980), *cert. denied*, 450 U.S. 999, 101 S.Ct. 1704, 68 L.Ed.2d 200 (1981).

7. I find as a matter of law that the implementation of Rule 11 inquiry by the Court filed on January 28, 1994, demonstrates no bias against Defendant General Motors or any bias as to defense attorneys of a continuing personal nature *and not* simply bias against an attorney because of his conduct. *In re Beard, supra*, at 830. Defendant's attorneys filed and served a Motion for Recusal relying on 28 U.S.C. § 144 and 28 U.S.C. § 455(a). The Motion for Recusal under 28 U.S.C. § 144, which was filed on January 18, 1994, was defective in that it was not accompanied by the affidavit of a party, nor was the Motion filed accompanied by a Certificate of Good Faith by local defense counsel.

8. I further find that Canons 3.C and 4.A of the Code of Judicial Conduct were not violated by this Court.

9. I find as a matter of law that the Order and Rule to Show Cause pursuant to Rule 11(c)(1)(b) of the Federal Rules of Civil Procedure issued to Joel H. Smith and Stephen G. Morrison shall be provided to the Clerk of the Federal Court for transfer to another federal judge.

10. Public confidence in the impartiality and fairness of the judiciary must forever remain inviolate. This concept transcends all other considerations. Therefore, I find that a reasonable person could possibly view my mere appearance on the same legal education program with Mr. Butler and Mr. Few, Attorneys for Plaintiffs in a case pending before me, as compromising the fairness and impartiality of the Presiding Judge. Now, therefore, for this reason only, and further out of a super abundance of caution, I hereby recuse myself from further participation in these cases. The Orders resulting from hearings on December 10, 17, and 21, 1993 are vacated (a total of five (5) Orders dated December 30, 1993), but the Rule 11 Motion dated January 28, 1994, directed to Mr. Stephen G. Morrison and Mr. Joel H. Smith for Rule 11 sanctions remains in full force and effect and is to be heard by the judge to whom this case is next assigned.

IT IS SO ORDERED.

Supreme Court, U.S.
FILED
AUG 11 1997
CLERK

(3)

No. 96-1902

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

JAMES E. BUTLER, JR.,

Petitioner,

v.

GENERAL MOTORS CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

REPLY TO BRIEF IN OPPOSITION

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August 11, 1997

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REPLY TO BRIEF IN OPPOSITION

I. Respondent Concedes That No Underlying Action Was Pending Before The Fourth Circuit, Yet Identifies No Independent Basis For That Court's Jurisdiction.

Petitioner urges that a civil compensatory contempt claim may proceed only so long as it is collateral and incidental to an ongoing civil proceeding. *See* Pet., 24-27. Neither the Constitution nor any federal rule or statute creates an independent cause of action or an independent basis of jurisdiction to pursue such a claim. *See id.*

In the very first sentence of its opposition brief, respondent GM concedes that "[t]his case grew out of a *separate* products liability action" between one of Butler's clients and GM: the *Cameron* action. Opp., 1 (emphasis added). GM further concedes that, while the *Cameron* action settled in December 1994, this "separate action" proceeded. *See id.*, 6.[1/] Like the court below, however, GM fails to identify any *independent legal basis* on which the court of appeals could have retained jurisdiction to proceed with this case after the *Cameron* litigation ended. *See id.*, 15-17.

Instead, GM mischaracterizes the issue, arguing that nothing about the disposition of the underlying *Cameron* case could have undermined the "ongoing vitality" of the Fourth Circuit's March 23, 1994 order, which "remains binding law to this day." *Id.*, 16, 15. The vitality of the Fourth Circuit's March 23 order, however, is not the issue; the issue is whether the Fourth Circuit had any *judicial power* to entertain GM's contempt claim after the only case that was properly

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[1/] GM actually states that the *Cameron* suit settled in December *1995*, but this is an error. *Compare* Opp., 6 *with* Pet., 11 *and* Pet. App., 5a n.2.

before it—the *Cameron* case—had terminated.[2/]

On this issue, there is indeed a clear conflict among the circuits. The Fourth Circuit here and the Fifth Circuit have both held that civil contempt claims may proceed after the disposition of the underlying cases from which they arise. *See* Pet., 8a n.3; *Petroleos Mexicanos v. Crawford Enters., Inc.*, 826 F.2d 392, 400 (5th Cir. 1987). By contrast, the Seventh and Eleventh Circuits have held that "'[c]ivil contempt proceedings are considered to be a part of the action from which they stem,'" and "'there is no such thing as an independent cause of action for civil contempt.'" *D. Patrick, Inc. v. Ford Motor Co.*, 8 F.3d 455, 459 (7th Cir. 1993) (citations omitted); *accord Blalock v. United States*, 844 F.2d 1546, 1550 (11th Cir. 1988) (per curiam).[3/]

GM attempts to distinguish the latter cases by arguing that, in those cases, "the question was whether a litigant could file a separate and distinct cause of action for contempt." Opp., 17. Here, however, GM has already admitted that this case, too, is a "separate" and distinct case from the previously terminated *Cameron* action, and it could not seriously contend otherwise. *Id.*, 1. The two cases seek different relief for

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[2/] As Butler has noted, in contrast to the Fourth Circuit, both the Georgia state court in *Moseley* and the Kansas federal court in *Cockrum* did have the power to recognize and enforce any "ongoing vitality" in the Fourth Circuit's order and both were better positioned to do so. *See* Pet., 28 n.13; 29. GM has never explained why it failed to seek any needed remedy in those courts.

[3/] The fact that a separate panel of the Fourth Circuit reached a conclusion that conflicts with the holding below does not signal the absence of "the circuit split alleged by Butler" (Opp., 17); rather, it only underscores the lower courts' confusion. *See Finn v. Schiller*, 72 F.3d 1182, 1188 (4th Cir. 1996) (implicitly contradicting the decision at issue here). In any event, the circuit split exists regardless of *Finn*.

different claims and even involve different parties: Mark Cameron was GM's party-opponent in the *Cameron* case; his attorney, James Butler, is its party-opponent here.

Moreover, GM's proffered distinction—that, unlike *D. Patrick* and *Blalock*, this case involves the "invo[cation of] judicial contempt powers to enforce an order of ongoing vitality" (*id.*, 17)—is ephemeral. By definition, *all* contempt claims relate back to some extant, prior order that the purported contemnor is alleged to have violated. The underlying orders at issue in *D. Patrick* and *Blalock* were no less "vital" than the Fourth Circuit order at issue here.

To the contrary, in *D. Patrick*, although the Seventh Circuit properly held, as a matter of *law*, that there is no independent cause of action for civil contempt, it actually proceeded to address (and to affirm the dismissal of) the particular complaint at issue on the merits because the court recognized, as a matter of *fact*, that the district court had expressly reserved jurisdiction to revisit its underlying order (a judgment of dismissal pursuant to a settlement agreement) through its contempt powers, if necessary. *See* 8 F.3d at 460-61. Here, by contrast, the Fourth Circuit did not expressly reserve jurisdiction after the *Cameron* settlement and had no legal basis for presiding (as a court of first instance) over GM's contempt claim after that suit ended.

Indeed, this Court has unanimously held that, once a settlement results in a case's outright dismissal, federal jurisdiction over the matter is lost. *See Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375 (1994). If that was true in *Kokkonen*, where the issue concerned one party's compliance with the settlement that occasioned the dismissal, then it should equally be true here, where the issue concerns the far weightier subject of judicial contempt and where the "vestigial" claim involves a non-party to the original suit (*i.e.*,

one party's attorney).

GM's effort to distinguish *D. Patrick*, *Blalock*, and *Finn* is also surprising in view of the position taken by its counsel in another petition presently pending before the Court. In a petition filed only two months before their current opposition brief, GM's counsel cited all three of these cases for the very proposition that Butler advances here: that "[a] court's civil contempt powers . . . are limited to affording *compensatory or coercive* relief in an *ongoing proceeding*; that is why 'there is no such thing as an independent cause of action for civil contempt.'" Pet. at 7, *E.I. DuPont de Nemours & Co. v. Bush Ranch, Inc.*, ___ U.S.L.W. ___ (May 8, 1997) (No. 96-1777) (hereinafter "*DuPont* Pet.") (emphasis added). Not long ago, therefore, GM's counsel agreed with Butler's argument and with the need for this Court to address this issue.

Finally, GM's reliance on this Court's decisions in *Willy v. Coastal Corp.*, 503 U.S. 131 (1992), and *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990), is misplaced. *See* Opp., 16. Neither case involved the judicial contempt power. Rather, both involved Rule 11 sanctions. *See Willy*, 503 U.S. at 132-39 (holding that, on the facts presented, Rule 11 sanctions could survive a *subsequent* determination that the district court lacked jurisdiction); *Cooter & Gell*, 496 U.S. at 393-98 (holding that voluntary dismissal of a complaint did not divest the district court of power to impose Rule 11 sanctions for the baselessness of that complaint).[4/]

[4/] Indeed, GM's counsel has acknowledged that "*Cooter & Gell* does not remotely stand for the proposition that a court may at any time entertain a private *criminal* contempt action or an independent *civil* contempt action." *DuPont* Pet. at 8 n.1.

The exercise of power under Rule 11, which is an express grant of judicial authority, involves different considerations and poses far fewer constitutional concerns than the exercise of an "inherent" contempt power. And while Rule 11 sanctions may survive the absence of jurisdiction, civil contempt sanctions may not. *See Olcott v. Delaware Flood Co.*, 76 F.3d 1538, 1552 (10th Cir. 1996) ("in the absence of subject-matter jurisdiction, Rule 11 sanctions are enforceable while a civil contempt citation is not") (citing *Willy*); *see also* Pet., 27-30.

II. The Proceeding Below Was Impermissibly Criminal.

GM characterizes as "frivolous" Butler's assertion "that the Fourth Circuit's sanction is punitive rather than compensatory" and hence, impermissibly criminal. Opp., 12. As GM points out, the Fourth Circuit "took pains to emphasize that the sanction imposed here was compensatory . . . in nature." *Id.* (citing contempt order).

As this Court has held, however, the determinative consideration is not the sanctioning court's "subjective intent" or how it characterizes its order, but rather, how the proceeding was substantively conducted and the actual "character and purpose" of the sanction imposed. *International Union, UMWA v. Bagwell*, 512 U.S. 821, 828, 827 (1994) (citations omitted). Here, as the record reveals, the proceeding and sanction have the unmistakable indicia of a punitive action. *See* Pet., 8-10, 21-24. In GM's own words, the proceeding was conducted "to vindicate . . . the dignity of th[e] Court," *id.*, 112a, and as GM's counsel has conceded elsewhere, "[a] punitive action aimed at vindicating a court's authority, of course, is the very paradigm of a

criminal contempt action." *DuPont* Pet. at 7 (citing *Bagwell*).[5/]

Moreover, GM itself expressly asked for either civil *or criminal* penalties in its papers below—both before and after the show-cause hearing—and both GM and the Fourth Circuit expressly declined to clarify whether the proceeding was civil or criminal before, at, or even after that hearing. Pet., 6, 8-10, 11. The fact that the court subsequently dubbed its sanction "civil" when it issued its order ten months later does not make it so and does not satisfy Butler's due process right to know *in advance* the nature of the charge against him.[6/]

III. The Fourth Circuit's March 23, 1994 Order Was Ambiguous As A Matter Of Law.

Butler contends that the Fourth Circuit's March 23, 1994 order was precatory in its use of the verb "should" and thus, as a matter of law, could not constitute an unmistakable, injunctive command sufficient to support the court's $190,000

[5/] GM offers no response to the observation that if this proceeding is civil, then every criminal contempt proceeding may be rendered civil by ordering a fine to be based on attorney fees and paid to the complainant rather than the court. Pet., 23-24.

[6/] GM repeatedly criticizes Butler for "confus[ing]," "conflat[ing]," and "gloss[ing] over the critical distinction[s]" between different forms of contempt. Opp., 9, 15, 16. In fact, Butler's petition is based, in part, on the critical distinctions between civil and criminal contempt, which GM referred to as "pettifogging distinctions" below. Pet., 9 (quoting GM counsel). With respect to GM's alleged (but largely unexplained) distinction between coercive and compensatory *civil* contempt, however, Butler submits that there is no such distinction for purposes of the principle stated in *Gompers* that settlement of the underlying action terminates the civil contempt power. *See Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 451-52 (1911); Pet., 24-25 & n.11.

contempt sanction. Pet., 16-18. GM assails this argument that there is a common-sense difference between "should" and "shall" as "belated sophistry." Opp., 14. According to GM, "[m]erely to restate this argument is to refute it." *Id.* Butler submits that precisely the opposite is true; indeed, the distinction could not be more fundamental.

Nor is Butler's argument on this point "a factbound challenge to the Fourth Circuit's application of settled law." *Id.* Again, as GM's own counsel has recently argued to this Court, "whether an order is clear enough to 'confor[m] to legal requirements [for contempt] is a question of law over which [the courts] retain plenary review.'" *DuPont* Pet. at 13 (citation omitted); *see generally id.*, 10-14.[7/]

Finally, GM's assertion that *United States v. Robinson*, 922 F.2d 1531 (11th Cir. 1991), and *In re Baum*, 606 F.2d 592 (5th Cir. 1979), are inapposite because "both were *criminal* contempt proceedings that involved wholly different facts" is unavailing. Opp., 14-15. The relevance of those cases resides not in the types of contempt they involved but in the fact that, in contrast to the Fourth Circuit here, those courts found similarly vague orders to be insufficiently specific as a matter of law to support a finding of contempt. *See* Pet., 17 & n.5. Moreover, while GM is correct that *Robinson* was a criminal contempt case, *In re Baum* was civil.

IV. Petitioner Was Entitled To An Evidentiary Hearing.

In responding to Butler's assertion that the Fourth Circuit

[7/] In any event, even if this argument did constitute only a "factbound challenge," that fact would only further undercut GM's assertion that there was no genuine issue of material fact here sufficient to support Butler's request for an evidentiary hearing. *See* Part IV, *infra*; Opp., 10-12.

denied him due process when it denied him an evidentiary hearing, GM concedes that if Butler had presented a genuine issue of material fact, he would have been entitled to such a hearing. Opp., 11. This concession yields the point.

Butler plainly presented the court of appeals with genuine issues of material fact, both at the initial contempt phase and at the subsequent sanctions phase. At the contempt phase, Butler observed that there was no evidence before the court that his actions had *actually caused any harm* to GM in the *Moseley* and *Cockrum* cases—a necessary finding for any compensatory civil contempt ruling.[8/] Because GM offered no evidentiary showing of causation or harm at all at that phase of the proceedings, *see* Pet., 10, the court either should have dismissed the case outright or else ordered GM to submit some evidence. Instead, the court found as a matter of fact on an empty record that "[t]here is no question that GM was injured;" "suffered a compensable loss;" and was forced "to incur a considerable expense to defend [the *Moseley* and *Cockrum*] actions." *Id.*, 7a; *see also id.*, 11-12.

Thus, when the court referred the matter to Judge Doumar "'for review and determination of the proper amount to be assessed'" against Butler, *id.*, 12, it was foreordained that Judge Doumar would recommend a substantial monetary fine. Judge Doumar himself recognized that his hands were tied in this respect by the Fourth Circuit's order. *See id.*, 20-21 n.8. Notwithstanding this fact (and the fact that Butler continued to be denied both access to GM's allegedly supporting evidence

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[8/] *See, e.g., United States v. United Mine Workers*, 330 U.S. 258, 304 (1947); *In re Kave*, 760 F.2d 343, 351 (1st Cir. 1985); *see also Rowe v. General Motors Corp.*, 586 F. Supp. 368, 369 (N.D. Ga. 1984) (holding that GM's noncompliance with a court order could not support a contempt finding because the complainants "failed to prove that they were harmed by [the] noncompliance").

and the opportunity for a fair and open hearing and cross-examination, *id.*, 12-13), Butler still managed to demonstrate genuine issues of material fact at the sanctions phase of the proceeding: the court reduced GM's claimed "damages" in the *Moseley* and *Cockrum* cases by 76%. *See id.*, 13.

In taking Butler to task for failing to articulate what compelling evidence he would have presented if granted an evidentiary hearing, GM and the court below fundamentally misconstrue both Butler's objection and the law. As the Fourth Circuit itself acknowledged, the legal burden was on *GM*, not Butler, to prove both its contempt claim and the fact, amount, and cause of its alleged damages. *Id.*, 6a, 40a.[9/] The question, then, is not what Butler would have shown but rather, what GM would have shown and whether its showing could have withstood the scrutiny of cross-examination and rebuttal evidence in open court. In denying Butler the chance to test GM's proof, the Fourth Circuit's decision conflicts with the decisions of other courts that would have granted him that chance. *See id.*, 18-21.[10/]

[9/] There is a split of authority on whether the damages, like the contempt itself, must be proven by "clear and convincing" evidence or only by a "preponderance" of the evidence. *See* Pet., 40a (citing cases).

[10/] GM mischaracterizes and quotes out of context various statements by Butler's counsel to suggest that Butler had no evidence to offer and was willing to stand on the current record. *See* Opp., 10-11. In fact, Butler submitted substantial evidence that contradicted GM's showing and repeatedly objected to the absence of a proper hearing and exchange of evidence. In addition, the statements in question were all expressly premised on the fact that, without having access to GM's *in camera* showing or an opportunity for cross-examination, Butler could not responsibly identify what further evidence he might need to present.

V. The Court Disfavors Interlocutory Petitions.

In closing, GM half-heartedly suggests that Butler's petition should have been filed earlier. Opp., 18. In the same paragraph, however, GM concedes that the petition is timely. *Id.* In fact, because the Fourth Circuit's contempt order did not become final until the issuance of its sanctions order, the petition is both mature and timely, and an earlier interlocutory petition—based on the contempt order alone—would have been disfavored. *See, e.g., Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) (holding, in an analogous context, that the Court will review an earlier decision where review of a later decision, which ends the matter, calls upon the Court to notice and rectify errors in the first decision, and noting the oft-stated tenet that interlocutory petitions are disfavored); *In re Tetracycline Cases*, 927 F.2d 411, 413 (8th Cir. 1991) ("in the absence of the amount of the compensatory sanction the contempt order is not final").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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